Supreme Court, U.S.
FILED

981991 JUN 9 1999

OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

PUBLIC LANDS COUNCIL, ET AL., PETITIONERS,

v.

BRUCE BABBITT, UNITED STATES DEPARTMENT OF THE INTERIOR SECRETARY, ET AL., RESPONDENTS.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

ANDREW H. SCHAPIRO
Mayer, Brown & Platt
1675 Broadway
New York, NY 10019
(212) 506-2500

CONSTANCE E. BROOKS
C.E. Brooks & Associates, P.C.
1776 Lincoln, Suite 1010
Denver, CO 80203
(303) 863-0836

TIMOTHY S. BISHOP
Counsel of Record
STEFFEN N. JOHNSON
Mayer, Brown & Platt
190 South LaSalle St.
Chicago, IL 60603
(312) 782-0600

Counsel for Petitioners

16828

QUESTIONS PRESENTED

Whether, as the district court held and dissenting Judge Tacha substantially agreed, the Secretary of the Interior exceeded his authority under the Taylor Grazing Act, the Federal Land Policy and Management Act, and the Public Rangelands Improvement Act, when he promulgated regulations that

(1) destroy the protection and priority statutorily accorded to adjudicated rights to graze livestock on public lands managed by the Bureau of Land Management, by replacing established "grazing preferences" with variable "permitted uses";

(2) provide that the United States in the future will have title to structural range improvements made and paid for by grazing permittees; and

(3) allow grazing permits to be issued to persons not "engaged in the livestock business."

The Tenth Circuit divided 5-5 over whether to rehear this case *en banc*.

CORPORATE DISCLOSURE STATEMENT AND PARTIES TO THE PROCEEDINGS

Petitioners are the Public Lands Council, the American Farm Bureau Federation, the American Sheep Industry Association, the Association of National Grasslands, and the National Cattlemen's Beef Association. Petitioners are all not-for-profit organizations. None has parent corporations or non-wholly-owned subsidiaries, and no publicly held corporation owns 10% or more of any petitioner's stock.

Respondents are Bruce Babbitt, Secretary of the Department of the Interior, Tom Fry, Director, U.S. Bureau of Land Management, the Department of the Interior, and the U.S. Bureau of Land Management.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT AND PARTIES TO THE PROCEEDINGS ii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

A. Adjudicated Grazing Preferences and Their Evisceration by the "Permitted Use" Regulation . . 3

B. The Secretary's Unauthorized Assertion of Title to Range Improvements 7

C. The Secretary's Unauthorized Reduction of the Qualifications for Grazing Rights 8

D. The District Court's Decision Enjoining Enforcement of the Regulations 9

E. The Divided Court of Appeals' Decision and Evenly Divided Ruling Denying En Banc Review 11

TABLE OF CONTENTS-Continued

	Page
REASONS FOR GRANTING THE PETITION	12
I. THE SECRETARY'S REGULATIONS ARE FLATLY INCONSISTENT WITH THE GOVERNING STATUTES	13
A. The Secretary Has No Authority To Substitute "Permitted Use" For Adjudicated Grazing Preferences	13
B. The Secretary Has No Authority To Deny Permittees Title To Their Range Improvements .	20
C. The Secretary Has No Authority To Drop The Mandatory Qualification For Livestock Grazing Permits That The Permittee Graze Livestock . . .	21
II. REVIEW IS TIMELY NOW BECAUSE THE ISSUES PRESENTED ARE OF IMMENSE PRACTICAL IMPORTANCE AND NO CIRCUIT SPLIT IS LIKELY TO ARISE	24
CONCLUSION	30

TABLE OF AUTHORITIES

Cases:	*Page*
Andrus v. *Utah*, 446 U.S. 500 (1980)	29
Bailey v. *United States*, 516 U.S. 137 (1995)	22
Chevron U.S.A., Inc. v. *Natural Resources Defense Council*, 467 U.S. 837 (1984)	12, 19, 20
Chicago v. *Environmental Defense Fund*, 511 U.S. 328 (1994)	19
Chournos v. *United States*, 193 F.2d 321 (10th Cir. 1951)	18
Forgey Ranch Co. v. *Bureau of Land Management*, 116 IBLA 32 (1990)	9
Green v. *Bock Laundry Machine Co.*, 490 U.S. 504 (1989)	24
McClean v. *Bureau of Land Management*, 133 IBLA 225 (1995)	4, 16
Oman v. *United States*, 179 F.2d 738 (10th Cir. 1949) .	13
Oregon Revenue Dept. v. *ACF Indus.*, 510 U.S. 332 (1994)	23
Ortiz v. *Bureau of Land Management*, 126 IBLA 8 (1993)	16
Patterson, 56 Interior Dec. 380 (1938)	9

TABLE OF AUTHORITIES-Continued

Page

Robinson v. *Shell Oil*, 519 U.S. 337 (1997) 22

United States v. *Coleman*, 390 U.S. 599 (1968) 29

United States v. *Haggar Apparel Co.*, 119 S. Ct. 1392 (1999) 20

United States Nat'l Bank of Oregon v. *Independent Ins. Agents*, 508 U.S. 439 (1993) 23, 24

Statutes and Regulations:

43 U.S.C. § 315 . . . . . 2, 3

43 U.S.C. § 315b . . . . . *passim*

43 U.S.C. § 315c 7, 8, 21

43 U.S.C. § 315m 3, 13

43 U.S.C. § 1701 2

43 U.S.C. § 1752 . . . . . 7, 8

43 U.S.C. § 1901 . . . . . 2, 5

43 C.F.R. § 1610.5-5, -6 (1998) 15

43 C.F.R. § 4100.0-5(*o*) (1978) 3

43 C.F.R. § 4110.0-5 . . . . . 4, 6

TABLE OF AUTHORITIES-Continued

Page

43 C.F.R. § 4110.1 (1994) 8

43 C.F.R. § 4110.1 (1995) 9

43 C.F.R. § 4120.3-2 (1994) 7, 21

43 C.F.R. § 4120.3-2 (1995) 8, 20

43 C.F.R. § 4120.6-2, -3 (1978) 7

43 C.F.R. § 4130.2 (1978) 4

Miscellaneous:

G. COGGINS, PUBLIC NATURAL RESOURCES LAW (1998) 25, 26

78 Cong. Rec. (1934) 5, 17, 18, 25

139 Cong. Rec. (1993) 19, 28

Falen & Budd-Falen, *The Right to Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights*, 30 Idaho L. Rev. 505 (1994) 4, 14, 28

43 Fed. Reg. 29,058 (July 5, 1978) 5, 17

60 Fed. Reg. 9921 (Feb. 22, 1995) 6

P. FOSS, POLITICS AND GRASS (1968) 14

TABLE OF AUTHORITIES-Continued

Page

P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (Public Land Law Review Commission, November 1968) 24

H.R. 2520, 103d Cong., 1st Sess. (1993) 19

H.R. Rep. No. 73-903 (1934) 3

The Nature and Extent of the Department's Authority to Issue Grazing Privileges, 56 Interior Dec. 62 (1937) . 14

Pendery, *Reforming Livestock Grazing on the Public Domain*, 27 Envt'l L. 513 (1997) 24, 29

RANGELANDS REFORM 1994 FINAL ENVIRONMENTAL IMPACT STATEMENT 26

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-70a) is reported at 167 F.3d 1287. The order of the court of appeals granting respondents' petition for rehearing (App. 71a-72a) is reported at 167 F.3d 1287. The order of the court of appeals denying petitioners' petition for rehearing, and denying their petition for rehearing *en banc* by an equally divided vote (App. 73a-74a), is unreported. The opinion of the district court (App. 75a-100a) is reported at 929 F. Supp. 1436.

JURISDICTION

The judgment of the court of appeals was entered on September 1, 1998. Petitioners' timely petition for rehearing was denied on January 28, 1999. Respondents' timely petition for rehearing was granted and an amended opinion issued on February 8, 1999. On April 23, 1999, Justice Breyer extended the time for filing this petition for certiorari to June 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory and regulatory provisions pertinent to this case are set forth at App., *infra*, 101a-129a.

STATEMENT

This case—brought by a coalition of nonprofit ranching and farming organizations whose members are among the tens of thousands directly and adversely affected by the

decision below—challenges the validity of three Department of the Interior regulations that dramatically altered settled principles governing the use of public lands for grazing livestock. The relevant statutory framework, established through more than 60 years of legislation, is comprised of a series of enactments intended to bring certainty and stability to those who rely on the public lands for grazing their animals. See the Taylor Grazing Act, 43 U.S.C. § 315, *et seq.* (the "TGA"), the Federal Land Policy and Management Act, 43 U.S.C. § 1701, *et seq.* (the "FLPMA"), and the Public Rangelands Improvement Act, 43 U.S.C. § 1901, *et seq.* (the "PRIA"). In 1995, however, the Secretary of the Interior promulgated regulations that radically transformed Congress's carefully crafted scheme and undermined a system upon which ranchers had depended for decades.

One regulation (the "permitted use" rule) did away with the longstanding assurance that permittees would have the right to graze the public lands from year to year up to a historically-based, adjudicated maximum amount of forage. A second regulation (the "range improvements" rule), contrary to years of prior practice, vested in the United States title to permanent range improvements such as fences, wells, and pipelines paid for and built by ranchers. The third regulation (the "mandatory qualifications" rule) eliminated the long-standing requirement that applicants for livestock-grazing permits be "engaged in the livestock business."

The Secretary's regulations flout the will of Congress as expressed in the plain language of the TGA, threaten grave harm to range-dependent ranchers and western communities, and reduce the asset value and security of financial institutions that have extended credit to the ranching industry. Because the divided decision of the Tenth Circuit is likely to be the last word on the validity of those regulations absent this Court's review, certiorari is warranted.

A. Adjudicated Grazing Preferences and Their Evisceration by the "Permitted Use" Regulation

Congress's "whole purpose" in enacting the TGA was "to conserve the public range *in aid of the livestock industry*." H.R. Rep. No. 73-903, at 2 (1934) (emphasis added). To that end, the TGA authorized the Secretary of the Interior to designate public lands "chiefly valuable for grazing and raising forage crops" and to issue "permits to graze livestock" in these "grazing districts." 43 U.S.C. §§ 315, 315b. Because applicants for permits far outnumbered available rangelands, Congress charged the Secretary with allocating grazing rights fairly, according to established priorities. It further instructed that "[s]o far as consistent with the purposes and provisions of [the Act], grazing privileges recognized and acknowledged shall be adequately safeguarded." *Id.* §§ 315b, 315m.

Following passage of the TGA, the Department of the Interior engaged in an adjudication process to allocate grazing privileges. That twenty-year process involved extensive data collection, input from local grazing advisory boards, and "case-by-case" assessment of the historical use and forage capacity of the public lands each applicant sought to graze. App. 15a, 51a-57a, 77a. Qualified applicants were awarded specific "grazing preferences," "measured in Animal Unit Months (AUMs), the amount of forage necessary to sustain one animal for one month." App. 77a, 51a-53a; see 43 C.F.R. § 4100.0-5(*o*) (1978). Those adjudicated rights to graze "attached to the base property, and followed the base property if it was transferred," providing "predictability and security to livestock operators who remained in one area." App. 77a-78a.

An adjudicated grazing preference was "a one-time decision of the Secretary, made when he first allocated grazing privileges on a particular allotment of the public

range." App. 57a. It "represented the upper limit that a permittee could graze if optimal conditions prevailed, all relevant land could be placed in active use, and the Secretary allowed him or her to graze up to that upper limit." App. 53a. The forage actually authorized for and used by a permittee in a given year typically differed from the preference. The Secretary adjusted a permittee's "active use" allowance upward or downward to account for changes in the condition of the range. App. 52a-53a. See *McClean* v. *Bureau of Land Management*, 133 IBLA 225, 232 (1995) ("[I]ncreased forage production on the Federal range had absolutely no effect on grazing preferences," but "merely meant that those who had established grazing preferences could exercise more of those preferences or be awarded additional use"); Falen & Budd-Falen, *The Right to Graze Livestock on the Federal Lands: The Historical Development of Western Grazing Rights*, 30 Idaho L. Rev. 505, 508 (1994).

Congress again addressed livestock grazing uses when it adopted the FLPMA in 1976. The FLPMA and its implementing regulations worked some changes in the procedures for issuing permits and the criteria for determining future grazing preferences. Permittees were entitled to "first priority" for renewal if willing to "accep[t] the terms and conditions to be included in the new permit" (43 C.F.R. § 4130.2(e)(3) (1978)), and permits were to be "modified or canceled" as necessary to comply with applicable "land use planning decisions." *Id.* § 4130.2(d)(3). Moreover, post-1978 adjudications of grazing preferences—the *new* adjudications necessary when new land became available for grazing—no longer had to be tied strictly to the number of livestock that could be supported from forage and feed produced on the allotted range. See 43 C.F.R. § 4110.0-5; *McClean*, 133 IBLA at 233 n.14.

Notwithstanding those changes, the Secretary did not disturb *previously* adjudicated grazing preferences. To the contrary, noting "serious concern" among "livestock operators now authorized to graze on the public lands," the Secretary specifically ruled that "[those] with a grazing license, permit, or lease will be recognized as having a preference for continued grazing use on these lands. [Their] *adjudicated grazing use*, their base properties, and their areas of use (allotments) *will be recognized* under these grazing regulations." 43 Fed. Reg. 29,058 (July 5, 1978) (emphasis added). The Secretary's interpretation reflects the FLPMA's several savings provisions (Pub. L. 94-579, § 701), which specifically preserved the TGA and every "land use right or authorization existing" when the FLPMA was enacted. *Id.* § 701(a), (f). The 1978 PRIA likewise made no change in existing grazing preferences. 43 U.S.C. § 1901 *et seq.*

Under the TGA, FLPMA, and PRIA, grazing preferences effectively "remained in place not just from year-to-year within the ten-year term of the permit, but also from permit to permit." App. 55a. Preferences thus "served as a stabilizing force for the livestock industry and promoted orderly use of the range by guaranteeing permittees the right to graze a predictable number of stock on the public lands and by allowing them to gauge how large or small their livestock operations could be." App. 54a. As the district court held, "the grazing preference guaranteed permittees a right to graze from year to year those amounts of forage that the Secretary actually authorized and provided them with the certainty that if forage were abundant, grazing up to their preference limit would be authorized." *Ibid.*; see 78 Cong. Rec. 5371 (1934) (Congress enacted the TGA in order to provide ranchers with "assurance as to where and what kind of range they may have and *depend upon* for their stock, what they can *definitely rely upon* in terms of pasturage") (emphasis added).

Secretary of Interior Bruce Babbitt drastically changed the Department's grazing regulations in 1995. Consistent with the statutory history outlined above, existing regulations defined a grazing preference as "the total number of [AUMs] of livestock grazing on public lands apportioned and attached to [the permittee's] base property." 43 C.F.R. § 4100.0-5 (1994). The 1995 regulations redefine the term "grazing preference" to mean only "a superior or priority position against others for the purpose of receiving a grazing permit." *Id.* § 4100.0-5 (1995). The new definition makes no reference to the number of AUMs adjudicated by the Secretary, thus "end[ing] the long-standing DOI recognition of the adjudicated levels of grazing." App. 60a; 60 Fed. Reg. 9921 (Feb. 22, 1995) ("The definition omits reference to a specified quantity of forage, a practice that was adopted * * * during the adjudication of grazing privileges").

Having eliminated forage allocation from the concept of a "grazing preference," the Secretary now regulates forage as a mere "permitted use," defined as the forage allocated by an applicable "land use plan." 43 C.F.R. § 4100.0-5. As a "permitted use," a permittee's maximum grazable forage "is established solely by a land use plan adopted by the BLM," which is subject to change by the BLM. The regulations terminate adjudicated grazing preferences "across the board, for all permittees, without reference either to their individual circumstances or to the condition of the land covered by their permits." App. 62a. To be sure, the permittee retains "a bald right to preference at renewal time." *Ibid.* But there is no longer any assurance that historically adjudicated grazing privileges will be honored.

The "permitted use" rule thus "erases the certainty and predictability that existed under the pre-1995 regulatory scheme," substituting a regime in which "the agency has nearly unfettered discretion" over forage use. App. 62a. The

land use plan will now determine whether and how many livestock a permittee may put on the public lands. Absent protected grazing rights, grazing may take second place in the land use plan to competing mineral lease, off-road vehicle, wilderness, and other uses. The permitted number of livestock will vary drastically depending on which land use issue of the day garners most public support.

B. The Secretary's Unauthorized Assertion of Title to Range Improvements

The TGA also governs ownership of range improvements constructed by grazing permittees on public lands—fences, wells, reservoirs, and the like that can cost tens and even hundreds of thousands of dollars. If the right to use property containing such improvements is transferred, the Act mandates that the permittee who made the improvements must be reimbursed. 43 U.S.C. § 315c ("No permit shall be issued which shall entitle the permittee to the use of such improvements *constructed and owned by a prior occupant* until the applicant has paid to such prior occupant the reasonable value of such improvements"). The FLPMA further provides for "reasonable compensation" for improvements when a permit is canceled so lands can be used for "another public purpose." *Id.* § 1752(g).

Prior to the Secretary's 1995 actions, regulations provided that permittees would hold title to improvements they paid for and built pursuant to range improvement permits. The government would hold title only to those improvements constructed pursuant to cooperative agreements whereby the permittee and the Secretary jointly pay for the improvement. 43 C.F.R. §§ 4120.6-2 to -3 (1978); App. 66a-67a. Even then, title to "structural or removable" improvements was "shared by the United States and cooperator(s) in proportion to the actual amount of the[ir] respective contribution[s]." 43 C.F.R. § 4120.3-2 (1994). The 1995 regulations, in contrast,

"mak[e] all permanent range improvements subject to cooperative agreements." App. 35a-36a. And they provide that "title to permanent range improvements such as fences, wells, and pipelines where authorization is granted after August 21, 1995 shall be in the name of the United States"—regardless of the breakdown of construction costs. 43 C.F.R. § 4120.3-2(a), (b) (1995).

This change is significant. "[S]ince title to improvements is not in the hands of the permittees who construct them, permittees are not statutorily entitled to any compensation from later users" for their investments. App. 68a. 43 U.S.C. § 315c (new permittee must compensate for improvements "owned by" prior occupant"); § 1752(g) (compensation for permittee's "interest in" improvements). And without ownership, the permittee cannot secure the third-party financing that is essential for most major range improvement projects, such as costly projects to develop water and improve its range-use distribution, which benefits wildlife and big game as well as grazing uses.

C. The Secretary's Unauthorized Reduction of the Qualifications for Grazing Rights

The TGA authorizes the Secretary to issue grazing permits to "bona fide settlers, residents, and other stock owners." 43 U.S.C. § 315b. "Preference shall be given," the Act further mandates, "to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned by them." *Ibid.*

Prior to 1995, the Department consistently interpreted § 315b to require that all grazing permittees "be engaged in the livestock business." 43 C.F.R. § 4110.1 (1994). This did not mean that permit holders had to be engaged *exclu-*

sively—or even primarily—in the livestock business. See, *e.g.*, *Forgey Ranch Co.* v. *BLM*, 116 IBLA 32 (1990) (permitting bank engaged in livestock business to retain grazing permit). "From the beginning," however, the government "granted grazing permits and leases only to applicants engaged in the livestock business." App. 87a; see, *e.g.*, *Patterson*, 56 Interior Dec. 380 (1938) (denying application because applicant was not engaged in livestock business).

The Secretary's 1995 regulations eliminated the long-standing requirement that applicants for grazing permits be "engaged in the livestock business." The regulations retained requirements that permittees "own or control land or water base property," be United States citizens, and be authorized to conduct business in the State for which the permit is sought. 43 C.F.R. § 4110.1 (1995). But one need no longer "graze livestock" to obtain a "permi[t] to graze livestock." 43 U.S.C. § 315b. The current "mandatory qualifications" rule eliminates that requirement.

D. The District Court's Decision Enjoining Enforcement of the Regulations

In July 1995, petitioners challenged the final regulations alleging that the "permitted use," "title to range improvements," and "mandatory qualifications" regulations were beyond the Secretary's statutory authority and invalid on their face. The district court in Wyoming, Judge Brimmer, struck down those regulations and enjoined the Secretary from enforcing them.

Emphasizing the TGA's requirement that "recognized and acknowledged" grazing privileges "be adequately safeguarded," the district court rejected the Secretary's contention that his "permitted use" rule was "a change in form, not substance" that "d[id] not eliminate or interfere with any-

thing in the [TGA]." App. 76a. "Under the 1995 regulations," the court observed, "a permittee no longer has an adjudicated right to graze a predictable number of livestock on public lands." App. 78a. Whereas grazing preferences were "painstakingly adjudicated" and "could not be canceled, suspended, or reduced without an evidentiary hearing," the "right of renewal" provided by the permitted use regulation allows the Secretary to change a permittee's grazable forage "[w]ith a mere stroke of his pen." App. 78a-79a. Such a rule "violate[d] the Act's specific mandate to adequately safeguard grazing preferences." App. 79a.

The district court also struck down the new range improvements rule. The court reasoned that the TGA provision requiring a new permittee to compensate a prior occupant for rangeland improvements "strongly suggests that the individual who constructed the improvement should own it." App. 82a. The court found further support for its ruling in the FLPMA's mandate that the United States compensate a permittee "for the value of his interest in any range improvements" when it cancels a grazing permit. App. 82a-83a. The TGA and FLPMA together "clearly indicate that Congress intended to grant title to range improvements to those who constructed them." App. 83a.

Finally, the district court invalidated the 1995 regulation eliminating the requirement that permittees to graze livestock be "engaged in the livestock business." Citing the Act's established priorities for granting permits and its legislative history, the court explained that "Congress intended [the TGA] to benefit people actually engaged in the livestock business." Congress did not intend that non-livestock owners should be able to obtain "permits they cannot use * * * thereby preclud[ing] livestock operators from grazing their livestock on public lands." App. 87a.

E. The Divided Court of Appeals' Decision and Evenly Divided Ruling Denying En Banc Review

A divided panel of the Tenth Circuit reversed the district court's decision in relevant part. The majority concluded that the "permitted use" regulation was not a significant modification of the law, but merely a "return to the position taken in the 1978 regulations." App. 21a. Those regulations, it held, had done away with recognition of historically adjudicated preferences. As for Congress's mandate that grazing privileges be "adequately safeguarded," the panel was satisfied that "any change in a privilege assigned through the permit process is safeguarded to the extent that parties aggrieved by the Secretary's decisions have the right to challenge them." App. 32a.

The majority also sustained the range improvements rule. Citing the Secretary's "discretion" to "authorize construction [of improvements] under 'such cooperative agreement' as he 'may approve,'" the panel reasoned that "nothing in the statutory language directs where * * * title must lie." App. 34a-35a.

Finally, the court rejected petitioners' challenge to the mandatory qualifications rule. Notwithstanding the TGA's limited authorization of "permits *to graze livestock*," the court focused on the Act's mandate that preference for such permits be given to "bona fide occupants or settlers" and "owners of water rights" in addition to "landowners engaged in the livestock business." App. 43a. In light of this language, the panel held that § 315b did not require the Secretary to issue grazing permits only to those engaged in the livestock business. *Ibid.*

Judge Tacha dissented as to the validity of the permitted use regulation. Noting the "importance of the statutory command that * * * grazing privileges recognized and

acknowledged shall be adequately safeguarded," she rejected the majority's view that adjudicated grazing levels were not "recognized" under the 1978 regulations. App. 50a. While "the 1978 regulations altered the criteria for awarding *new* preferences," Judge Tacha observed, there is "no question * * * that the 1978 regulations continued to recognize *already-existing* grazing preferences." App. 52a (emphasis added).

Judge Tacha also dissented as to the validity of the range improvements rule. The TGA's provision that "a permittee who 'construct[s] and owns' an improvement on the public lands is entitled to compensation for its value," she concluded, "plainly indicates * * * that when a permittee constructs an authorized improvement, he or she holds title to that improvement." The majority's view "renders that compensation provision meaningless," because "without title, a permittee [will] not be entitled to the compensation for which the statute provides." App. 68a-69a.

Petitioners' petition for rehearing *en banc* was denied by an evenly divided court.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to review the Tenth Circuit's decision because the Secretary's regulations are inconsistent with statutory language, legislative history, and prior agency interpretations, and cannot be justified under *Chevron*. The issues presented are of immense practical importance throughout the western states, where BLM manages some 170 million acres of public rangelands —including huge portions of Nevada, Utah, Oregon, and Wyoming—on which more than 20,000 permittees graze livestock. App. 3a. In addition to harming grazing permittees, their families, and their communities, the challenged regulations directly impact thousands of financial institutions

that have made loans based upon the security of grazing preferences.

The controversial nature of the legal questions in issue and the need for this Court's immediate intervention is shown by the sharp division of opinion below. The district court and Judge Tacha concluded that the Secretary's regulations exceeded his statutory authority; the panel majority held otherwise; and the court of appeals divided 5-5 as to whether to review the panel decision *en banc*. In those circumstances, this Court should not allow a two-judge opinion to be the last word on issues of such critical practical importance throughout the western states, in particular where no other court of appeals is likely ever to address those issues.

I. THE SECRETARY'S REGULATIONS ARE FLATLY INCONSISTENT WITH THE GOVERNING STATUTES

In promulgating the challenged rules, the Secretary has sought to transform by regulation the entire management system governing the use of the public range. That prerogative, however, is reserved for Congress.

A. The Secretary Has No Authority To Substitute "Permitted Use" For Adjudicated Grazing Preferences

As a matter of law, the Secretary lacks the authority to modify the TGA by means of the permitted use rule, for Congress has directly and unambiguously spoken to the question at issue: "So far as consistent with the purposes and provisions of [the Act], grazing privileges recognized and acknowledged shall be adequately safeguarded." 43 U.S.C. §§ 315b, 315m; see *Oman* v. *United States*, 179 F.2d 738, 742 (10th Cir. 1949) (the Secretary has "an affirmative obligation to adequately safeguard" ranchers' grazing

privileges). The permitted use rule most emphatically does not "adequately safeguard" "grazing privileges recognized and acknowledged," and therefore is invalid.

1. The vehicle by which grazing privileges historically have been "recognized and acknowledged" is the grazing adjudication conducted pursuant to section three of the TGA. After the TGA was passed, "there were many more applicants for use of the range than could be accommodated." The Secretary allocated grazing privileges to some applicants and denied them to others using an "adjudicatory process" that "took nearly two decades." App. 57a. The adjudication process recognized ranchers' historical claims to the use of particular parcels of land: "[o]nly those livestock operators who could prove a prior use of the unclaimed lands * * * could acquire a preference." Falen & Budd-Falen, *The Right to Graze Livestock on the Federal Lands*, 30 Idaho L. Rev. at 508. Following a grazing adjudication and issuance of a "grazing decision," "the Secretary engaged in that same type of adjudicatory process only when new public lands became available for grazing." App. 57a. These fixed, historically adjudicated grazing levels were, from the beginning, essential to the TGA's stated goals of stabilizing the livestock industry and promoting the orderly use of the range. See App. 54a. See generally *The Nature and Extent of the Department's Authority to Issue Grazing Privileges*, 56 Interior Dec. 62, 65 (1937); P. Foss, Politics and Grass 65-67, 101 (1968).

The Secretary's new regulation unilaterally eliminates these grazing decisions, which were the product of a careful adjudication process. The regulation completely dispenses with any consideration of "recognized and acknowledged" adjudicated grazing levels. It redefines the entrenched concept of the "grazing preference"—which hitherto had meant a maximum amount of forage "apportioned and attached" to the permittee's base property—to mean simply

a superior position against others for the purpose of receiving or renewing a grazing permit or lease. And it relegates the allocation of forage to a newly added concept, "permitted use," that ties the available forage to applicable land use plans, not to the historical adjudication of grazing levels under the Act. Under the permitted use rule, "the maximum amount of forage that a permittee can graze is established solely by a land use plan adopted by the BLM, with no reference to the results of the grazing adjudications." App. 62a. "The result," as Judge Tacha observed, "is that the agency has nearly unfettered discretion to * * * increase or decrease permittees' maximum allowed forage use without reference to the individual grazing decisions laboriously adjudicated by the Secretary following passage of the TGA." *Ibid.* Land use plans must accommodate a host of competing uses, and are reviewed periodically to reflect new data or information, new or revised policies, or changed circumstances. 43 C.F.R. §§ 1610.5-5, 1610.5-6 (1998). By making "permitted use" subject to those changeable plans, the regulations destroy predictability and certainty and deprive ranchers of any assurance that they can graze a specified number of livestock.

It is no exaggeration to say that "grazing privileges recognized and acknowledged" are accorded *no regard whatsoever* under the new regime. By removing the maximum forage allocation from the grazing preference, severing the longstanding link between AUMs and the Department's original adjudication of preference, and apportioning the AUMs to land use plans rather than base property, the Secretary has breached his fundamental duty under the Act to adequately safeguard recognized and acknowledged grazing privileges. There may be a number of different ways in which the Secretary could "adequately" protect adjudicated grazing privileges; creating a scheme completely unhinged from existing adjudicated preferences is not one of them.

2. The majority erroneously concluded that the regulation complies with the TGA because previously adjudicated privileges have not been "recognized" after the adoption of the 1978 regulations. The majority contended that under those rules, "previously adjudicated grazing uses were to be recognized" only "for the length of existing permits." App. 17a. "Nowhere in the 1978 regulations," the court declared, "was there any requirement * * * that the authorizing officer must recognize or refer to the original grazing adjudications, or even the most recent adjudications, in issuing new permits." App. 19a.

The majority's view rested on the false premise that the Secretary adjudicated a new grazing preference each time he renewed a grazing permit. App. 22a. But an "adjudication" was a one-time event in the life of a grazing permit, and the Secretary did not adjudicate a new grazing preference merely because a permit was up for renewal. See *Ortiz* v. *BLM*, 126 IBLA 8, 9 (1993) (involving a preference that, despite numerous transfers, "date[d] from the early 1930s" when it was issued to the original applicant); *McLean*, 113 IBLA at 227 (involving a preference dating from prior to 1970).

The majority's mistake derived in part from its misinterpretation of the 1978 regulations' reference to "future adjudications." Contrary to the majority's assumption, "future adjudication" on its face refers not to the renewal of a grazing permit, but to "a post-1978 decision made by the Secretary to allocate permanent grazing privileges to various applicants *when new lands come under BLM's control* and become available for grazing." App. 58a (emphasis added).

Although the 1978 rules permitted the government to adjudicate a new grazing preference "on a case-by-case basis, subject to the Secretary's detailed regulatory requirements" (App. 56a), such changes were "based either on the individual circumstances of a particular permittee—*e.g.*, in response

to a change in the permittee's control over the base property—or on the condition of particular grazing allotments—*e.g.*, if a reduction in grazing was necessary to improve rangeland productivity." App. 53a. In that way, the Secretary fulfilled his statutory obligation to "specify from time to time numbers of stock and seasons of use." 43 U.S.C. § 315b.

But apart from such circumstances "the preference level generally remained the same from year-to-year, through transfers of the base property, and from permit to permit." App. 54a. "The new permitted use rule," by contrast, "wipes the slate clean." App. 65a. Accordingly, the new regulation cannot be supported as a mere extension of the 1978 regulations.

Indeed, the majority's interpretation is undercut by the Department's own pronouncements at the time it promulgated the 1978 rules. Noting "serious concern" among "livestock operators now authorized to graze on the public lands," the Secretary ruled that those "with a grazing license, permit, or lease will be recognized as having a preference for continued grazing use on these lands. [Their] *adjudicated grazing use*, their base properties, and their areas of use (allotments) *will be recognized* under these grazing regulations." 43 Fed. Reg. 29,058 (July 5, 1978) (emphasis added).

3. The majority's decision was also based on its erroneous view that stabilization of the livestock industry was not a primary goal of the TGA. App. 24a n.5.

The very title of the legislation identified one of its purposes as *"to stabilize the livestock industry dependent upon the public range."* 78 Cong. Rec. 5371 (1934). Congressman Taylor of Colorado, after whom the bill would be named, quoted that title and remarked that this purpose is "of the greatest and highest possible importance." *Ibid.*

Taylor explained that without assurance of the amount of forage available, "there would be no permanence to the business;" ranchers "would not be safe; they would have no credit with the banks for securing money." *Ibid*. And he paid special note to the "many vested rights, which should and must be respected and protected, which have grown up on the range." *Ibid*. Senator Adams, also of Colorado, commented during debate on the bill that the lack of assurance and certainty as to grazing land and forage had interfered with the rancher "in many ways among others with his capacity to borrow money because, lacking the assurance of feed for his animals, it has been more difficult to procure necessary loans." *Id*. at 11,140. As anticipated by the framers of the TGA, the grazing preference has made a critical contribution to the financial stability of the ranching industry. See App. 79a.

More generally, Congress made clear that the law was intended to provide ranchers and farmers with "some type of *assurance* as to where and what kind of range they may have and *depend on* for their stock, what they can *definitely rely* upon in the way of pasturage." 78 Cong. Rec. at 5371 (emphasis added).

There can be no doubt but that protecting and ensuring stability for range-dependent ranchers was a manifest purpose of the TGA. See *Chournos* v. *United States*, 193 F.2d 321, 323 (10th Cir. 1951) (holding that the purpose of the TGA is to "stabilize the livestock industry and to permit the use of the public range according to the needs and the qualifications of the livestock operators with base holdings"). Until the Secretary sought to sever the historical tie between maximum forage allocations and adjudicated preferences, that worthy goal had been honored in Department of the Interior regulations. The permitted use rule, however, does violence to that clearly articulated Congressional purpose.

4. Indeed, a legislative proposal incorporating many of the grazing regulations that the Secretary later adopted was *rejected* by Congress in 1993. H.R. 2520, 103d Cong., 1st Sess. (1993), defeated after filibuster at 139 Cong. Rec. D1265-66 (1993). And although the sponsor of H.R. 2520 generally supported the Secretary's proposed regulations, even he excluded from his bill the permitted use rule, explaining "that eliminating th[e] preference" and substituting permitted use "would devalue the permit in the eyes of lending institutions. I knocked that out." 139 Cong. Rec. S14083, 14087 (1993). Despite Congress' defeat of the range reform regulations in 1993 and the absence of any new statute or authority, the Secretary nonetheless went ahead and adopted the regulations now before this Court. His usurpation of the legislative prerogative could hardly be more flagrant.

5. Although portions of the statutory and regulatory framework are complex, the ultimate issue in question is straightforward. Congress mandated that recognized and acknowledged grazing privileges be safeguarded. The only privileges that have been "recognized and acknowledged" in any significant fashion are historically adjudicated grazing preferences. Yet the Secretary's regulations pay those adjudicated preferences no heed.

No tenet of administrative law requires that a rule so clearly at odds with the governing statute be the object of deference. Under the framework enunciated in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842 (1984), when "Congress has directly spoken to the precise question at issue * * * that is the end of the matter." Such is the case here.

And even if the statutory language somehow did leave room for interpretation, the permitted use rule "goes beyond the scope of whatever ambiguity [the statute] contains." *Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 339

(1994). By allowing the Secretary to disregard adjudicated preferences entirely, and base forage-allocation decisions on "land use" plans rather than grazing privileges, that rule is "manifestly contrary to the statute" and therefore invalid. *Chevron*, 467 U.S. at 843-844; see *United States* v. *Haggar Apparel Co.*, 119 S. Ct. 1392, 1399 (1999) (regulation will not control if it is "inconsistent with the statutory language or is an unreasonable implementation of it").

The Secretary's radical revision of the law is at once extremely significant for western ranchers and entirely improper. As the District Court summarized (App. 79a-80a):

> With a mere stroke of his pen, the Secretary has boldly and blithely wrested away from Western ranchers the very certainty, the definitiveness of range rights, and the necessary security of preference rights that their livestock operations require. Congress gave Western ranchers these rights by enacting the Taylor Grazing Act, and many decades of satisfactory operations and the course of case by case adjudications have confirmed these rights. * * * [T]he Secretary's disregard of his congressionally imposed duty * * * must be stopped before it wreaks havoc with the ranching industry that Congress has tried to preserve.

B. The Secretary Has No Authority To Deny Permittees Title To Their Range Improvements

43 C.F.R. § 4120.3-2(b) purports to vest in the United States title to all permanent range improvements authorized under cooperative agreements after August 21, 1995. That regulation is plainly inconsistent with the TGA.

The TGA specifically addresses the ownership of improvements. It provides that permanent improvements such as fences and wells may be constructed under permit or cooperative arrangement approved by the Secretary, and that a new applicant cannot use "such improvements constructed and owned by a prior occupant" until he has compensated the prior occupant for the reasonable value of the improvements. 43 U.S.C. § 315c.

To contend, as the Tenth Circuit majority did, that "the entire payment provision can * * * be viewed as purely conditional, operative only if the Secretary allows both construction and ownership" (App. 37a), is to strain the language and sense of the statute beyond the breaking point. The clear and necessary implication of the payment provision is that a permittee who lawfully pays for and constructs an improvement owns it. As Judge Tacha noted, "discretionary language or rulemaking authority is conspicuously absent on the question of who should hold title to range improvements." App. 70a.

Moreover, the majority's reading of the statute, like the regulation itself, would render the compensation provision meaningless. If a permittee did not own the improvements he pays for and constructs, there would be no reason for a statutory provision that requires him to be compensated for the improvements that he owns. The statute does contain such a provision, and Congress clearly intended to preclude a regime under which the United States could confiscate by fiat improvements paid for by permittees. The range improvements rule is in conflict with the will of Congress as expressed in the TGA and, accordingly, is invalid.

C. The Secretary Has No Authority To Drop The Mandatory Qualification For Livestock Grazing Permits That The Permittee Graze Livestock

The TGA authorizes the Secretary to issue "permits *to graze livestock*." 43 U.S.C. § 315b (emphasis added). It is flatly at odds with the plain language of the TGA for the

Secretary to allow issuance of livestock-grazing permits to those who do not graze livestock.

By purporting to eliminate the requirement under the TGA (and prior regulations) that those receiving livestock-grazing permits be "engaged in the livestock business," the Secretary would allow anyone who owns or leases land or water base property to obtain livestock grazing permits, regardless of whether or not he grazes livestock. In upholding the Secretary's action, the court seriously misread the relevant statutory provision. Section 315b of the TGA authorizes the Secretary

> to issue * * * permits to graze livestock * * * to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range * * *. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights.

The majority emphasized that preference in issuing livestock grazing permits must go to "landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights," and read this clause to mean that *only* landowners need be engaged in the livestock business, whereas occupants, settlers, and owners of water or water need not be so qualified.

But statutory terms must be read not in isolation but in light of "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil*, 519 U.S. 337, 341 (1997); see *Bailey* v. *United States*, 516 U.S. 137, 146 (1995) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme"). Attention to context shows that

the court's construction of Section 315b—which is even at odds with its own determination that the Secretary has no authority to issue a grazing permit for non-grazing "conservation" uses (App. 45a-49a)—is simply wrong.

First, the entire section is concerned with who may be granted permits "to graze livestock." It makes no sense to read the provision to include among possible permittees classes of persons who do not have livestock to graze.

Second, application of the provision is expressly limited to "bona fide settlers, residents, and *other stock owners*." Congress's use of the phrase "and other stock owners" plainly signifies that the "bona fide settlers" and "residents" to whom permits will be issued all are to be stock owners. See, *e.g.*, *U.S. Nat'l Bank of Oregon* v. *Independent Ins. Agents*, 508 U.S. 439, 454 (1993) ("text consists of words living a communal existence * * * the meaning of each word informing the others and all in their aggregate tak[ing] their purport from the setting in which they are used").

Third, the court's construction is irrational. It would mean that those who satisfy the base property requirement because they own land would have to be engaged in the livestock business, while those who satisfy the base property requirement because they own water would not have to be engaged in the livestock business. There is no conceivable basis for such a distinction. However "plausible when viewed in isolation," the court's reading "is untenable in light of [Section 315b and the TGA] as a whole" and does not "'produc[e] a substantive effect that is compatible with the rest of the law.'" *Oregon Revenue Dept.* v. *ACF Indus.*, 510 U.S. 332, 343 (1994).

The proper reading of the statute is one that gives preference to landowners engaged in the livestock business, bona fide occupants or settlers *engaged in the livestock business*,

or owners of water or water rights *engaged in the livestock business*—the way the Secretary interpreted the statute for six decades. It is akin, for example, to a rule regarding confidentiality that would purport to apply to "lawyers who obtain confidential information, paralegals, or investigators." The logical construction would be that the rule is meant to apply to paralegals and investigators who obtain confidential information. While perhaps inartfully drafted, the statute must be read so as to make sense. See *U.S. Nat'l Bank of Oregon*, 508 U.S. at 454; *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

So construed, the provision not only makes sense, but also comports with Congress's purpose for including it in the statute: to protect ranchers against itinerant grazers "who owned or leased little land but had grazed their flocks over the public lands and stripped it of its forage, thereby denying it to local ranchers, who had a heavy taxable investment." P. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (Public Land Law Review Commission, November 1968). That purpose was served by requiring that the livestock owners who received permits owned suitable base property. When thus properly understood, the statute clearly does not support the Secretary's abandonment of the requirement that permittees be engaged in the livestock business.

II. REVIEW IS TIMELY NOW BECAUSE THE ISSUES PRESENTED ARE OF IMMENSE PRACTICAL IMPORTANCE AND NO CIRCUIT SPLIT IS LIKELY TO ARISE

The Secretary's 1995 regulations were "intensely controversial," "hotly disputed," engendered "massive public interest," and worked a "revolutionary change" in the historic treatment of grazing on the public lands. Pendery, *Reforming Livestock Grazing on the Public Domain*, 27

Envt'l L. 513, 514, 525, 259, 564 (1997). The impact of this "major shift in federal range policy" (*id.* at 518) on public-range-dependent ranchers and the use of millions of acres of the public range cannot be overstated.

1. Judge Tacha explained the severe adverse effects imposed on the ranching community by the Secretary's unlawful and ahistoric actions. The grazing preferences eliminated by the Secretary's regulations promoted stability and certainty in the livestock industry "by guaranteeing permittees the right to graze a predictable number of stock on the public lands and allowing them to gauge how large or small their livestock operations could be." App. 54a. That stability is essential to effective business planning by individual permittees—hence also to the livelihoods of western ranching families. A rancher can no more manage his or her business efficiently without reasonable predictability as to the number of livestock that can be grazed than a manufacturer could manage its business if leases for its plants were subject to abrogation from year to year.

Certainty is also "practically important to permittee-ranchers because the value of their private base ranches is determined in part by" the attendant grazing rights, so that "[d]iminution of the permit * * * diminishes their net worth." G. COGGINS, PUBLIC NATURAL RESOURCES LAW ¶ 19.02[1][a], at 19-9 (1998). Consequently, the assurance provided by grazing preferences has been important to the willingness of banks and other financial institutions to provide the loans often necessary to keep permittees in business. As the district court recognized, "[b]ank loans are often based on [livestock] carrying capacity. A permittee without a definite and certain grazing preference may be unable to obtain necessary financing and be forced out of the livestock industry." App. 79a; see also 78 Cong. Rec. at 5371 (ranchers "cannot secure money from the banks if they

cannot show that they have some definite and sufficient place on the range where their stock may be adequately grazed"); G. COGGINS, *supra*, ¶ 19.02, at 19-14 ("The number of [animal unit months] in the permit is critical to the rancher-permittee" because the "value of the permit is figured into the sale price of the ranch to which the permit is appurtenant, and bankers make loans on the basis of, and secured by, permit value"); RANGELANDS REFORM 1994 FINAL ENVIRONMENTAL IMPACT STATEMENT 26, 127.

Banks and other financial institutions too depend on the value of grazing preferences as collateral for loans. Absent assurance that a ranch will continue to carry a specific number of livestock, these institutions will be forced to withdraw or radically change their lending policies. See Brief *Amicus Curiae* of Farm Credit Associations in Support of Ptn. for Rehearing (Oct. 30, 1998). Congress's purpose to enable ranchers to secure necessary credit will be thwarted.

What the "permitted use" concept has "wrested away from Western ranchers," the district court correctly determined, is "the very certainty, the definitiveness of range rights, and the necessary security of preference rights that their livestock operations require"—a change in the ground rules for grazing on the public lands that "wreaks havoc with the ranching industry" and threatens to put many ranchers out of the livestock business altogether. App. 79a-80a.[1] Congress, of

---

[1] Commenting on the effect of the TGA a few years after its passage, Congressman Taylor observed (Appellee's Add. 6, at 48):

> Ranch values are up 40 to 60 percent over 5 years ago. * * * Ranches that were going under the hammer 10 years ago are now contributing to the local tax structure. Today the stockman who has qualified by dependent property and prior use of the range to graze a definite number of stock and definite range, has a definite asset. It has vastly improved his credit facilities. Banks and loan companies know that the man who has an established livestock business and grazing privileges on the public range contributes to the economic stability of his community. * * * There are evidences everywhere that property values have increased in line with the legitimate range rights attached to the private property upon which grazing privileges are based.

The Secretary would now reverse this course and take away these gains.

course, is free to alter the terms upon which the public lands have been used for grazing for over 60 years by stripping permittees of their settled grazing preferences, but it has not done so. Given the central importance of preferences to 20,000 plus ranching families who contribute some $400 million to the economies of the far western states, and given that the management of 170 million acres of public lands is affected, this Court should not allow the Secretary's glib destruction of grazing preferences in favor of "permitted uses" based on periodic, changeable land use plans to go unreviewed.

The Secretary's reduction in the qualifications necessary to obtain grazing permits, so that a permittee need no longer be in the livestock business, likewise undermines the very industry that Congress sought to promote and stabilize. It threatens that in the future, rangelands will be taken out of livestock production to be used for other purposes, diminishing the total land available for grazing and thwarting permit applicants who *are* in the livestock business.

The adverse practical impact of the remaining regulation in issue is equally easy to discern. If ranchers have to make significant investments in structural range improvements like

fences, water tanks, pumps, pipelines, and cattle guards without maintaining *any* title to those improvements, the incentive to make improvements is significantly reduced. See 139 Cong. Rec. S15297, S15372-73 (Nov. 9, 1993) (the rule "is a disincentive to the construction of improvements on public lands"). And without ownership of improvements, permittees will in any event be unable to obtain the financing necessary for most significant range improvement projects.

Such an unfair, involuntary transfer of ownership —ownership that is fully recognized in the TGA and FLPMA and that can reflect the investment of hundreds of thousands of dollars—can serve only to undermine ranching as a business and a way of life. Knowledgeable commentators have concluded that "[f]ederal lands ranching is a culture in crisis" and can only be preserved if courts protect ranchers' grazing rights as Congress intended:

> If current trends continue, this way of life will be extinct within twenty (20) years. Ranchers do not need handouts or government support programs; all they need is recognition and protection of their federal land preferences * * * [S]ince the federal agencies have made it clear that they will not recognize any rights unless compelled by the court to do so, *the courts must step in if this culture is to survive for the coming generations*.

Falen & Budd-Falen, *The Right to Graze Livestock on the Federal Lands*, 30 Idaho L. Rev. at 524 (emphasis added). Petitioners ask this Court to grant certiorari not to preserve western ranching culture for its own sake, but because that is what Congress directed in specific ways that the Secretary has chosen to ignore or evade.

2. Given the tremendous practical importance of the issues raised in this petition, this Court should not delay review

until a circuit split arises. See, *e.g.*, *Andrus* v. *Utah*, 446 U.S. 500, 506 (1980); *United States* v. *Coleman*, 390 U.S. 599, 601 (1968) (granting certiorari, in cases where there was no circuit split, to resolve significant issues affecting the public lands). It is highly unlikely that any such division of opinion among the courts of appeals will ever occur.

First, the public lands managed by the BLM on which private grazing is permitted are located in the Ninth and Tenth Circuits, with very small and isolated grazing lands in the Eighth Circuit. Pendery, *supra*, 27 Envt'l L. at 522. No other courts of appeals than these (and the D.C. Circuit) would even in *theory* have an opportunity to address the propriety of the regulatory provisions in issue.

Moreover, as a *practical* matter, the Tenth Circuit's ruling in this case will be the last word on the subject unless this court intervenes. Widely dispersed *individual* permittees in the low-margin livestock business lack the financial resources to mount a costly challenge to the regulations in district court and to pursue their case on appeal. The most likely plaintiffs in a complex case such as this are petitioners here—the leading national organizations representing the interests of permittees. But petitioners chose to combine their limited resources to litigate their case in the Tenth Circuit. In short, it is unlikely that another circuit will ever have occasion to pass on the questions presented in the petition. Even if a plaintiff did seek to raise those issues elsewhere, that litigation would not be resolved for years, during which time ranchers would suffer from the Secretary's unlawful destruction of their rights.

Absent this Court's immediate review, a panel opinion of just two judges—with which the district judge and a dissenter disagreed and which half the participating judges of the Tenth Circuit thought sufficiently problematic to warrant *en*

banc review—will stand as the law of the land and result in tens of thousands of permittees losing long-established rights that Congress sought to protect. In these circumstances, nothing will be achieved by letting the issue "percolate" in the lower courts to see if a circuit split develops: this Court's review is timely *now*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

ANDREW H. SCHAPIRO
Mayer, Brown & Platt
1675 Broadway
New York, NY 10019
(212) 506-2500

TIMOTHY S. BISHOP
Counsel of Record
STEFFEN N. JOHNSON
Mayer, Brown & Platt
190 South LaSalle St.
Chicago, IL 60603
(312) 782-0600

CONSTANCE E. BROOKS
C.E. Brooks & Associates, P.C.
1776 Lincoln, Suite 1010
Denver, CO 80203
(303) 863-0836

JUNE 1999

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 96-8083

PUBLIC LANDS COUNCIL, *et al.*, Plaintiffs-Appellees,

v.

BRUCE BABBITT, UNITED STATES DEPARTMENT OF INTERIOR SECRETARY, *et al.*, Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING
(D. Ct. No. 95-CV-165-B)

[February 8, 1999]

Before SEYMOUR, Chief Judge, PORFILIO, and TACHA, Circuit Judges.

SEYMOUR, Chief Judge.

The question before us on this appeal is whether the Secretary of the Interior acted within his authority under the Taylor Grazing Act of 1934 (TGA), 43 U.S.C. §§ 315 *et seq.*, the Federal Lands Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701 *et seq.*, and the Public Rangelands Improvement Act of 1978 (PRIA), 43 U.S.C. §§

1901 *et seq.*, when he promulgated new regulations governing the administration of livestock grazing on public lands managed by the Bureau of Land Management (BLM). Following publication of the final rules in 1995, the Public Lands Council along with several livestock industry groups (collectively PLC) brought suit in the district court challenging the facial validity of ten of the new regulations. The district court held four of the regulations invalid and enjoined their enforcement. The four regulations concerned: (1) the use of the terms "grazing preference" and "permitted use" to denote priorities and specify grazing use for purposes of issuing grazing permits (permitted use rule); (2) ownership of title to range improvements (range improvements rule); (3) the elimination of the requirement that applicants for permits must "be engaged in the livestock business" (qualifications rule); and (4) the issuance of permits for "conservation use" in addition to permits for the grazing of livestock (conservation use rule).

The Secretary appeals the district court's order enjoining enforcement of the aforementioned regulations, asserting that the new rules do not conflict with the governing statutes and that the reviewing courts must therefore defer to the Secretary's rulemaking authority. For the reasons stated below, we reverse the district court's order holding invalid the permitted use rule, the range improvements rule, and the mandatory qualifications rule, and we affirm the district court's order holding invalid the conservation use rule.

I

BACKGROUND

A. The Controlling Statutes

Our review of the challenged 1995 grazing regulations is set against the backdrop of Congress' enacted policy regarding administration of the public lands. The Secretary of the Interior, through the BLM, manages approximately 170 million acres of public rangelands throughout the western United States as guided and constrained by the TGA, FLPMA, and PRIA. We therefore begin with an overview of those statutes.

1. The Taylor Grazing Act

Until 1934, the federal government left unregulated the administration of millions of acres of unappropriated public lands in the western states, including Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. In response to damage to the public rangelands caused by decades of unregulated livestock grazing, Congress enacted the Taylor Grazing Act, establishing a threefold legislative goal: to regulate the occupancy and use of the federal lands, to preserve the land and its resources from injury due to overgrazing, and "to provide for the orderly use, improvement, and development of the range." 43 U.S.C. § 315a. One of the key issues the Act was intended to address was the need to stabilize the livestock industry by preserving ranchers' access to the federal lands in a manner that would guard the land against destruction. See Taylor Grazing Act, ch. 865, 48 Stat. 1269 (June 28, 1934).

In order to accomplish these purposes, Congress provided for the issuance of grazing permits under the supervision of the Secretary of the Interior, authorizing the

Secretary to identify lands "chiefly valuable for grazing and raising forage crops," 43 U.S.C. § 315, to place these lands in "grazing districts," *id.*, and to issue permits within the districts or grant leases outside the districts to "settlers, residents, and other stock owners" to graze livestock, *id.* §§ 315, 315b, 315m. The TGA also authorizes the Secretary to allow permittees to install range improvements on their grazing allotments and provides that new permittees must pay reasonable value as determined by the Secretary for range improvements "constructed and owned" by a prior occupant. *Id.* § 315c.

In addition, Congress granted the Secretary broad discretionary authority to balance the interests of those who wish to use the government's land against the need to protect the land from injury. The TGA commands the Secretary to "make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes" of the Act. *Id.* § 315a. The TGA further directs the Secretary to give renewal preference to those already holding permits, and to "adequately safeguard[ ]" the grazing privileges he recognizes, "[s]o far as consistent with the purposes and provisions" of the Act. *Id.* § 315b.

2. The Federal Land Policy and Management Act

Enacted in 1976, FLPMA represents Congress' express recognition that in over forty years of land management under the TGA, the BLM had failed adequately to protect and enhance the federal lands. See 43 U.S.C. § 1751(b)(1) ("Congress finds that a substantial amount of the Federal range lands is deteriorating in quality * * *."); H.R. REP. No. 94-1163, at 1 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6175 ("[I]n many instances [public land laws] are obsolete and, in total, do not add up to a coherent expression of

Congressional policies adequate for today's national goals."). Owing to the TGA's apparent deficiencies, FLPMA instructs the Secretary to "manage [through BLM] the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a). "Multiple use" requires management of the public lands and their numerous natural resources so that they can be used for economic, recreational, and scientific purposes without the infliction of permanent damage. *Id.* § 1702(c). "Sustained yield" is defined as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." *Id.* § 1702(h).

In order to manage the lands in accordance with the principles of multiple use and sustained yield, FLPMA requires land use planning:

> The Secretary shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. *Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, or set aside, or otherwise designated for one or more uses.*

Id. § 1712(a) (emphasis added). In keeping with this mandate, FLPMA contains several provisions specific to livestock grazing which chiefly provide that all grazing permits must be issued subject to terms and conditions consistent with FLPMA. *Id.* § 1752.

3. The Public Rangelands Improvement Act of 1978

Congress enacted PRIA in 1978. Among its purposes was to reaffirm "a national policy and commitment to: * * * manage, maintain, and improve the condition of the

public rangelands so that they become as productive as feasible for all rangeland values." 43 U.S.C. § 1901(b)(2). PRIA set forth Congressional findings that vast segments of the public rangelands remained in an unsatisfactory condition and that increased management and funding were needed to address the problem. See *id.* § 1901(a)(1)-(3). One of PRIA's primary effects was to implement a new grazing fee formula for domestic livestock grazing on the public rangelands. See *id.* § 1905; see also BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF THE INTERIOR, THE TAYLOR GRAZING ACT: FIFTY YEARS OF PROGRESS, 1934-1984, at 5 (noting Congress' failure to appropriate millions of dollars authorized by PRIA).

B. The 1995 Regulations

The 1995 grazing regulations made a number of changes to the administration of the then-existing federal grazing program.[1] We address below only those regulations held invalid by the district court.

1. Permitted Use Rule

As part of the scheme for issuing grazing permits and determining grazing levels, the rangeland management rules in effect prior to 1995 employed the term "grazing preference" to mean "the total number of animal unit months [AUMs] of livestock grazing on public lands apportioned and attached to base property owned or controlled by the permittee or lessee." 43 C.F.R. § 4100.0-5 (1994). One AUM represents the amount of forage necessary to sustain

[1] As is customary with administrative regulations, the regulations implementing and enforcing the TGA, FLPMA, and PRIA have been amended on several occasions since 1934, as we discuss *infra*.

one cow or horse or five sheep or goats for one month. *Id.* This "grazing preference" included "active use," defined as "the current authorized livestock grazing use," *id.*, which was adjusted according to rangeland conditions and was "based upon the amount of forage available for livestock grazing established in the land use plan," *id.* § 4110.2-2(a), as well as "suspended use," *id.*, which could be converted to active use should the rangeland's carrying capacity increase. The "grazing preference" was specified in all grazing permits or leases issued by the Secretary, *id.*; was attached to base property, *id.* § 4110.2-2(c); and was transferable with the base property in whole or in part upon application and approval, *id.* § 4110.2-3.

The 1995 regulations redefined the term "grazing preference" to mean "a superior or priority position against others for the purpose of receiving a grazing permit or lease," which is "attached to base property owned or controlled by the permittee or lessee." 43 C.F.R. § 4100.0-5 (1995). At the same time, BLM added the term "permitted use," defined as "the forage [expressed in AUMs] allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease." *Id.* "Permitted use" encompasses both active and suspended use. *Id.* § 4110.2-2(a). Like "grazing preference" in the previous rules, "permitted use" is specified in permits as a designated amount of forage expressed in AUMs, *id.*; is attached to base property, *id.* § 4110.2-2(c); and is transferable with the base property in whole or in part upon application and approval, *id.* § 4110.2-3.

2. Range Improvements Rule

Prior to 1995, BLM's regulations provided that title to many range improvements constructed under cooperative agreements upon application and approval by the Secretary, including fences, wells and pipelines, was "shared by the United States and cooperator(s) in proportion to the actual amount of the respective contribution to the initial construction." 43 C.F.R. § 4120.3-2 (1994).

Under the 1995 regulations, the government prospectively asserts title to "permanent" range improvements, such as fences, wells, reservoirs, pipelines, and stock tanks, and "non-structural" improvements such as seeding, spraying, and chaining, authorized after August 21, 1995. 43 C.F.R. § 4120.3-2 (1995). Specifically, the new regulations provide that all permanent improvements will be constructed under cooperative agreements between the permittees and BLM, and that all improvements constructed under such cooperative agreements will be titled in the government. *Id.* § 4120.3- 2(b). As under the previous scheme, the 1995 regulations provide for compensation to permittees for existing or future range improvements, requiring new permit applicants or transferees to pay the prior occupants for their "interest in the authorized improvements within the allotment as of the date of transfer." *Id.* § 4120.3-5.

3. Qualifications Rule

Under the previous regulations, in addition to owning or controlling base property used in a livestock operation, permit applicants were required to "be engaged in the livestock business." 43 C.F.R. § 4110.1 (1994). The new qualifications rule eliminates this requirement. See 43 C.F.R. § 4110.1 (1995). The new rule was devised to "clarify that mortgage insurers, natural resource conservation

organizations, and private parties whose primary source of income is not the livestock business, but who meet the [other criteria], are qualified for a grazing permit or lease." Department Hearings and Appellate Procedures; Cooperative Relations; Grazing Administration; Exclusive of Alaska; Final Rule, 60 Fed. Reg. 9894, 9901 (1995) (hereinafter Final Rule). The new regulations also altered the definition of "base property," see 43 C.F.R. § 4100.0-5 (1995), to "clarify that base property must be capable of serving as a base for livestock operations but it need not actually be in use for livestock production," 60 Fed. Reg. at 9901.

4. Conservation Use Rule

The 1995 regulations added "conservation use" as a permissible use of a grazing permit. See 43 C.F.R. § 4100.0-5 (1995) (defining "grazing permit" as a document that specifies "all authorized use [of public lands within a grazing district] including livestock grazing, suspended use, and conservation use"). "Conservation use" means "an activity, excluding livestock grazing, on all or a portion of an allotment" for the purpose of protecting the land and its resources, improving rangeland conditions, or enhancing resource values. *Id.* Conservation use may be approved for a period of up to ten years-i.e., for the entire duration of the permit. See *id.* § 4130.2(g)(1). According to the Secretary, conservation use will be initiated by request of the permittee and will not be forced on an unwilling permittee. See Final Rule, 60 Fed. Reg. at 9898. Allotments in conservation use will not be subject to grazing fees since no forage will be consumed by livestock. See *id.* BLM will not consider allowing another operator to use any resulting forage. See *id.*

As under the old rules, the 1995 regulations provide that BLM can temporarily suspend grazing for conservation reasons. See 43 C.F.R. §§ 4110.3-2 to -3 (1995) (describing procedures for reducing permitted use). In addition, the new

regulations add the term "temporary nonuse" to describe "the authorized withholding, on an annual basis, of all or a portion of permitted livestock use" at the request of a permittee. *Id.* § 4100.0-5. Temporary nonuse allows a permittee to place all or part of his "permitted use" in nonuse for up to three years for "reasons including but not limited to financial conditions or annual fluctuations of livestock." *Id.* § 4130.2(g)(2).

C. PLC's Challenge

Soon after the Secretary's proposed regulations took effect on August 21, 1995, PLC filed suit in the United States District Court for the District of Wyoming, challenging the facial validity of several of the new regulations. PLC later substituted a petition for review, seeking declaratory and injunctive relief on the same grounds stated in its complaint. PLC challenged most of the regulations on the grounds that the Secretary had exceeded his statutory authority, lacked a reasoned basis for departing from previous rules, or had failed to provide adequate responses to public comments. PLC also challenged two of the new regulations on constitutional grounds and asserted that the Final Environmental Impact Statement violated the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*

On June 13, 1996, the district court entered an Order on Petition for Review, holding in favor of PLC on four of the challenged regulations. See *Public Lands Council* v. *Department of Interior*, 929 F. Supp. 1436 (D. Wyo. 1996). The district court characterized the permitted use rule as ending longstanding recognition of grazing preferences adjudicated following enactment of the TGA, thereby depriving permittees of their statutory "right" to graze predictable numbers of stock. As such, the court held the

permitted use rule violates the TGA's mandate that "grazing privileges recognized and acknowledged shall be adequately safeguarded." *Id.* at 1440-41. In addition, the district court interpreted the TGA to require that range improvements be owned by the permittees who construct them, and held that the 1995 range improvements regulation violates this requirement. See *id.* at 1442-43. Finally, the district court held that eliminating the requirement that permit applicants be engaged in the livestock business violates the TGA's mandate that preference be given to such persons, see *id.* at 1444-45; and that the Secretary exceeded his authority under the TGA and FLPMA and lacked a reasoned basis in authorizing BLM to issue "conservation use" permits, see *id.* at 1443-44. The district court held in favor of the government on the remaining challenges to other parts of the new regulations, and the PLC does not contest these rulings on appeal.

D. Standard of Review

We review *de novo* a district court's decision regarding an agency action. See *Santa Fe Energy Prod. Co.* v. *McCutcheon*, 90 F.3d 409, 413 (10th Cir. 1996) (standard of review of agency action identical in both district and appellate court; "[o]nce appealed, the district court's decision is afforded no particular deference").

Our role as a reviewing court addressing PLC's facial challenge to the 1995 regulations is well established. Under section 706 of the Administrative Procedures Act (APA), 5 U.S.C. § 706, we cannot set aside any agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," *id.* § 706(2)(A), or unless it is "in excess of statutory jurisdiction, authority, or limitations, or short of a statutory right." *Id.* § 706(2)(C). See *Olenhouse* v. *Commodity Credit Corp.*,

42 F.3d 1560, 1574 (10th Cir. 1994) ("[T]he essential function of judicial review is a determination of (1) whether the agency acted within the scope of its authority, (2) whether the agency complied with prescribed procedures, and (3) whether the action is otherwise arbitrary, capricious or an abuse of discretion.") (citations omitted). Moreover, because PLC has challenged the 1995 regulations on their face and seeks to enjoin their enforcement, our review is also governed by the standard applicable to facial challenges. To prevail on a facial challenge, PLC "'must establish that no set of circumstances exists under which the [regulation] would be valid.'" *Reno* v. *Flores*, 507 U.S. 292, 301 (1993) (alteration in original) (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)).

Our review is also guided by the principles governing judicial review of agency action set forth in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984).

> In determining whether an administrative regulation permissibly construes the statute that an agency is charged with enforcing, our inquiry is shaped by the specificity of the Congressional enactment:
>
> "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the

> question for the court is whether the agency's answer is based on a permissible construction of the statute."

Quivira Mining Co. v. *Nuclear Regulatory Comm'n*, 866 F.2d 1246, 1249 (10th Cir. 1989) (quoting *Chevron*, 467 U.S. at 842-43).

Even under *Chevron's* second step, however, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *MCI Telecomm. Corp.* v. *AT & T*, 512 U.S. 218, 229 (1994); see *Southern Ute Indian Tribe* v. *Amoco Prod. Co.*, 119 F.3d 816, 835 (10th Cir. 1997) ("Even under the deference mandated by *Chevron*, 'legislative regulations are [not] given controlling weight [if] they are arbitrary, capricious, or manifestly contrary to the statute.'") (alterations in original) (quoting *Chevron*, 467 U.S. at 844), aff'd en banc on other grounds, 151 F.3d 1251 (10th Cir. 1998). "[N]o deference is warranted if the interpretation is inconsistent with the legislative intent reflected in the language and structure of the statute or if there are other compelling indications that it is wrong." *Mountain Side Mobile Estates Partnership* v. *Secretary of Housing & Urban Dev.*, 56 F.3d 1243, 1248 (10th Cir. 1995) (citation omitted).

With this standard of review in mind, we turn to an examination of the regulations invalidated by the district court. In doing so, we note at the outset that Congress and the various Secretaries of the Interior have developed over the last sixty years a somewhat complicated regulatory scheme governing the federal lands. Yet this complicated scheme stems from a simple premise: the lands at issue here belong to the United States government; the issuance of grazing permits "shall not create any right, title, interest, or estate in or to the lands." 43 U.S.C. § 315b. Congress

passed the aforementioned statutes governing when and how private individuals will be allowed to use those lands and charged the Secretary of the Interior with enforcing its intentions. We must therefore ask and answer the simple question whether the Secretary's regulations are consistent with the authority Congress has given him, or whether they conflict with Congress' *unambiguous* commands.

II.

THE PERMITTED USE RULE

Upon examining the relevant statutes, regulations, and the record, we are persuaded the permitted use rule comports with the authority granted the Secretary of the Interior under the TGA and FLPMA and demands our deference under Chevron.

In invalidating the permitted use rule, the district court held that the Secretary's decision to change the definition of "grazing preference" and to add the concept of "permitted use," whereby the terms and conditions specified in all grazing permits are determined in accordance with land use plans, ended the prior practice of "recognizing" the grazing preferences allocated following the TGA's passage in 1934. According to the district court, this failure to recognize the original grazing adjudications eliminated an important "right" granted by the TGA–the right to graze predictable numbers of stock from permit to permit. In eliminating this "right," the Secretary necessarily failed to "adequately safeguard[ ]" it as required by the TGA. The dissent adopts this characterization of the TGA and the existing regulations. An examination of the controlling statutes in light of the relevant regulations developed over the years to implement them, however, reveals that the permitted use rule neither conflicts with an unambiguous statutory command nor eliminates any

long-recognized right accorded permittees to graze predictable numbers of stock.

To place the 1995 permitted use rule in context, and to respond to the dissent's erroneous characterization of the regulatory scheme that obtained under the TGA and FLPMA prior to 1995, we begin with a discussion of earlier versions of BLM's regulations governing issuance of grazing permits. We follow with an analysis of the changes posed by the permitted use rule. We then explain how a close reading of the statutory language of the TGA and FLPMA mandates our ultimate conclusion that the Secretary of the Interior acted within his authority in issuing the permitted use rule.

A. The Regulatory Scheme

1. The Federal Range Code[2]

After enactment of the TGA in 1934, the Secretary of the Interior began the process of establishing grazing districts, issuing permits, and granting leases. At the time of the TGA's passage, the number of qualifying applicants far exceeded the amount of grazing land available to accommodate them. Therefore, the Department of the Interior (DOI) instituted a detailed adjudication process, guided by a set of priorities articulated in section three of the TGA, to determine which applicants would receive grazing permits. First priority in the issuance of permits went to applicants who owned land or water, i.e., "base property," in or near a grazing district, who were dependent on the

---

[2] The "Range Code" was a shorthand method of referring to the regulations governing grazing activity under the TGA, and its use disappeared completely in the 1978 revisions. See generally *Delmar & Jo McLean* v. *Bureau of Land Management*, 133 IBLA 225, 241 n.8 (Aug. 3, 1995).

public lands for grazing, who had used their land or water for livestock operations in connection with the public lands in the five years preceding the TGA's enactment, and whose land or water was situated so as to require the use of public rangeland for "economic" livestock operations. See DIVISION OF GRAZING, U.S. DEP'T OF THE INTERIOR, FEDERAL RANGE CODE, §§ 2(g)-(h), 4(a), 6(b)(1) (1938). Once the Secretary issued a favorable grazing decision regarding an individual applicant, the applicant received a ten-year permit which specified the maximum number of livestock, measured in AUMs, that the permittee was entitled to place in a grazing district.

2. The 1978 Regulations

As discussed above, Congress enacted FLPMA in 1976 to address the continued deterioration of federal rangelands that was occurring in spite of the Taylor Grazing Act. "The Federal Land Policy & Management Act of 1976 * * * was a comprehensive statement of the public policy of the United States, declaring that public lands be systematically inventoried and subjected to a land use planning process which would enable them to be managed by the Secretary of the Interior * * *." *Natural Resources Defense Council, Inc.* v. *Hodel*, 618 F. Supp. 848, 857 (E.D. Cal. 1985). In 1978, the Secretary issued new regulations under FLPMA governing grazing administration, which effected significant changes in the process for issuing grazing permits. See Bruce M. Pendery, *Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based Standards & Guidelines Blaze a New Path for Range Management*, 27 ENVTL. L. 513, 556 (1997) ("Over the years, the Range Code was 'amended as the occasion arose.' But when FLPMA was enacted in 1976, sweeping revisions of the regulations were made.") (quoting George C. Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland*

Management II: The Commons & The Taylor Act, 13 ENVTL. L. 1, 69 (1982) (footnote omitted)). At the outset, and in recognition of the gravity of the changes, the Secretary made provisions for the livestock operators already authorized to use the federal lands:

> Serious concern was expressed in several of the comments about how these grazing regulations will affect the livestock operators now authorized to graze on the public lands administered by the Bureau of Land Management. Livestock operators with a grazing license, permit, or lease will be recognized as having a preference for continued grazing use on these lands. There [sic] adjudicated grazing use, their base properties, and their areas of use (allotments) will be recognized under these grazing regulations.

43 Fed. Reg. 29,058 (July 5, 1978).

While the previously adjudicated grazing uses were to be recognized for the length of existing permits, "future adjudications of grazing use would be based on criteria vastly different than those provided in the Federal Range Code." *Delmer & Jo McLean* v. *Bureau of Land Management*, 133 IBLA 225, 233 (Aug. 3, 1995). The 1978 regulations specified that "[l]ivestock grazing permits and leases shall contain terms and conditions necessary to achieve the management objectives for the public lands * * * *identified in land use plans.*" 43 C.F.R. § 4120.2 (1978) (emphasis added). Grazing permits or leases issued under the regulations were subject to the following mandatory terms and conditions:

> (a) *The authorized officer shall specify* the kind and number of livestock, the period(s) of use, the allotment(s) to be used, and *the amount of use, in animal unit months, that can be made in every grazing*

permit or lease. The authorized livestock *grazing use* shall not exceed the livestock grazing capacity and *shall be limited or excluded to the extent necessary to achieve the objectives established for the allotment.*

(b) If it has been determined that allotment management plans are not necessary, or if allotment management plans have not been implemented where they are needed, *the authorized officer shall incorporate terms and conditions under this section in grazing permits or leases. The authorized officer shall modify these terms and conditions if the condition of the range requires modification of grazing use and may cancel grazing permits or grazing leases and grazing preferences as conditions warrant. These modifications and cancellations may be made at any time* and shall be put into full force and effect on the date specified by the authorized officer.

Id. § 4120.2-1 (emphasis added). The regulations made cancellation of grazing preferences mandatory when necessary to maintain compliance with land use plans: "When authorized grazing use exceeds the amount of forage available * * * or where reduced grazing is necessary to facilitate achieving the objectives in the land use plans, grazing permits or grazing leases and grazing preferences shall be canceled in whole or in part." *Id.* § 4110.3- 2(b) (emphasis added).

Grazing permits were offered "for a term not to exceed 10 years to qualified applicants." *Id.* § 4130.2(a). Permits were to "include appropriate terms and conditions," *id.* § 4130.2(b), were to be "modified or canceled in accordance with land use planning decisions," *id.* § 4130.2(d)(3), and were to be subject to annual review "and modification of terms and conditions as appropriate," *id.* § 4130.2(d)(4).

Most significant for purposes of this appeal, the permit renewal process provided as follows: "Permittees or lessees holding expiring grazing permits or leases shall be given first priority for receipt of new permits or leases *if:* * * * *[t]he permittee or lessee accepts the terms and conditions to be included in the new permit or lease by the authorized officer.*" *Id.* § 4130.2(e)(3) (emphasis added).

According to the plain language of the regulation, the renewal of permits was subject to a preference right in the sense that permit holders had priority to renew their permits. However, it is equally clear that new terms and conditions-including the numbers of stock permitted to graze-could be specified by the authorizing officer in such new permits and that any terms and conditions specified were required to be in accord with applicable land use plans. Nowhere in the 1978 regulations was there any requirement, or even the suggestion, that the authorizing officer must recognize or refer to the original grazing adjudications, or even the most recent adjudications, in issuing new permits.

3. The post-1978 regulations.

As the drafters of FLPMA envisioned, managing the federal lands through land use planning is a dynamic process that has often led the various Secretaries of Interior to alter the governing regulations. See H.R. REP. No. 94-1163, at 5 (1976), reprinted in 1976 U.S.C.C.A.N. 6175, 6179 (the BLM and the Forest Service "treat land use planning as dynamic and subject to change with changing conditions and values"). By 1994, many aspects of the original 1978 regulations had been altered, effectively softening the requirement that grazing preferences must at all times be consistent with land use plans. The 1978 regulations specified that terms and conditions should be modified or canceled "if the condition of the range requires modification of grazing use * * * at any time." 43 C.F.R. 4120.2-1(b) (1978).

However, the regulations in effect in 1994 specified that the authorized officer "*may* make changes," which were required to be "supported by monitoring, as evidenced by rangeland studies conducted over time, *unless the change is either specified in an applicable land use plan or necessary to manage, maintain or improve rangeland productivity.*" 43 C.F.R. § 4110.3 (1994) (emphasis added). Whereas the 1978 regulations required livestock grazing permits to contain terms and conditions "identified in land use plans," 43 C.F.R. § 4120.2 (1978), the 1994 version merely stated: "Livestock grazing permits and leases shall contain terms and conditions necessary to achieve the management objectives for the public lands and other lands under Bureau of Land Management administration," 43 C.F.R. § 4130.6 (1994).

Yet despite the changes from 1978, the primacy of the land use plans mandated by FLPMA remained apparent in the fact that changes specified in land use plans did not require other justification. Most significantly, the provisions for permit renewal remained exactly the same as they had been in 1978, that is, permits were renewable so long as "the permittee or lessee accepts the terms and conditions to be included by the authorized officer in the new permit or lease." *Id.* § 4130.2. Once again, the regulations effective in 1994 offer no hint that recognition of or reference to the original grazing adjudications was in any way required. The authorized officer was clearly empowered to specify the terms and conditions-including the numbers of stock and seasons of use-upon the renewal of grazing permits in accordance with land use plans.

4. The 1995 regulations

As explained above, the 1995 regulations challenged here divided the concept previously known as the "grazing preference" into two parts, defining "preference" as a priority position against others for purposes of permit

renewal and defining "permitted use" as "the forage allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease and * * * expressed in AUMs." 43 C.F.R. § 4100.0-5 (1995). It is apparent that one of the Secretary's purposes in promulgating the new regulations was to return to the position taken in the 1978 regulations under which the terms and conditions of a grazing permit *must* rather than *may* conform to land use plans. Nevertheless, changes in "permitted use" under the 1995 regulations, while mandatory if out of line with applicable land use plans, are in some respects more difficult to effect than under the 1994 regulations. Under the 1995 regulations *all* changes, even those specified in a land use plan, "must be supported by monitoring, field observations, ecological site inventory or other data acceptable to the authorized officer." *Id.* § 4110.3. Virtually all other aspects of the regulations governing permit issuance are identical to those obtaining in 1994.[3]

The district court and the dissent believe the 1995 regulations somehow "eliminated" all reference to the original grazing adjudications "recognized" under the pre-1995 regulations. This assertion, of course, begs the question of exactly where this prior recognition can be found. The dissent attempts to find it in its own "historical understanding of grazing preferences and the importance that they assumed in the operation of permittes' livestock businesses." Dissent at 1311. Without citation to any authority, the dissent then

---

[3] The new regulations at several points mandate that all grazing permits and leases are to contain such terms and conditions necessary to conform with the new Subpart 4180, entitled "Fundamentals of Rangeland Health and Standards and Guidelines for Grazing Administration." The district court upheld this portion of the new regulations and its validity is not at issue in this appeal.

describes at length a process whereby the Secretary made permit renewal decisions by "reference to" or in "recognition of" the original grazing adjudications. Dissent at 1310-12.

We know of no principle of administrative law that allows us to substitute our own unattributed assertions for the plain meaning of the regulations in seeking to review a regulatory scheme. We must therefore focus on the language of the regulations. As the preceding discussion demonstrates, since 1978 the number of AUMs allowed to graze on public lands has been specified by the Secretary upon the issuance of grazing permits in accordance with land use plans. At the close of the ten-year permit period, permit holders have first priority of renewal subject to the terms and conditions specified by the Secretary in accordance with land use plans. Although it may well be the case that there were long periods in which the Secretary did not exercise his authority to change the permitted number of AUMs in new permits,[4] this practice did not rise to the level of a regulatory mandate.

Because the Secretary has long had the authority to specify permitted grazing use upon the renewal of a grazing permit, the district court erred in characterizing the permitted use rule as deviating from past regulations by eliminating all recognition of the original grazing adjudications. To the extent the original adjudications affected the substance of future grazing permits, they were not "recognized" in the manner asserted by the dissent under any regulations promulgated since the enactment of FLPMA.

---

[4] For example, during the 1980s, the BLM adopted a moratorium on grazing reductions unless a need for such reductions was indicated by certain data. See Pendery, *supra*, at 557 & n.345.

B. The Controlling Statutes

We now assess whether the permitted use rule is consistent with the statutory mandates set forth in the TGA and FLPMA.

1. TGA

Under the 1995 permitted use rule, "[p]ermitted use is granted to holders of grazing preference and shall be specified in all grazing permits and leases." 43 C.F.R. § 4110.2-2(a) (1995). Nothing in the TGA precludes the Secretary from promulgating this regulation. The TGA provides in relevant part:

> [Grazing permits] shall be for a period of not more than ten years, subject to the *preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. * * * So far as consistent with the purposes and provisions of this subchapter*, grazing privileges recognized and acknowledged shall be *adequately* safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter *shall not create any right, title, interest or estate in or to the lands.*

43 U.S.C. § 315b (emphasis added). The language of section 315b clearly does not specify the "privileges" a grazing permit entails other than a general authorization to graze livestock for a certain period of time not to exceed ten years and a preferential right of renewal as a priority position against other permit applicants, which is encompassed in the new definition of "grazing preference." Moreover, the statute specifically provides that part of the Secretary's authority in issuing permits is "to specify from time to time

the numbers of stock and seasons of use," which is exactly what the permitted use rule does.

The permitted use rule is also consistent with the underlying purposes of the TGA. While stabilizing the livestock industry is one of several purposes of the Act, PLC and the dissent place far too much weight on this point.[5] The Act clearly states that the need for stability must be balanced

---

[5] Indeed, the Act treats stabilizing the livestock industry as a secondary goal. While this purpose is the third of several set out in the Act's uncodified preamble, the actual text of the statute references only safeguarding the rangeland and providing for its orderly use as primary objectives. See 43 U.S.C. § 315a ("The Secretary of the Interior shall * * * *do any and all things necessary* to accomplish the purposes of this subchapter, and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, *to preserve the land and its resources from destruction or unnecessary injury, [and] to provide for the orderly use, improvement, and development of the range.*") (emphasis added). Authorities in environmental law have observed that "[t]he one explicit theme recurring throughout the statute is the need for improvement of range conditions." Coggins & Lindberg-Johnson, *supra*, at 50-51.

Moreover, it is significant that BLM lands support only a small portion of the livestock industry. "[L]ivestock producers with Forest Service or BLM grazing permits constitute a small percentage of all livestock producers, even in the West. Only twenty-two percent of western beef cattle producers have federal grazing permits. Similarly, only nineteen percent of western sheep producers hold federal grazing permits. Thus, even in the West only about one in five livestock producers holds a federal grazing permit." Pendery, *supra*, at 523 (footnotes omitted). The Secretary is free to consider this fact in balancing the need for industry stability against the need to protect the federal lands from deterioration.

against the need to protect the rangeland. See *id.* § 315a. The lack of mandatory terms in the statute, together with the discretion vested in the Secretary of Interior, make clear that it is the Secretary who is charged with striking that balance as he sees fit. See 43 U.S.C. § 315a (Secretary empowered to do "any and all things necessary to accomplish the purposes of this subchapter"); *Natural Resources Defense Council, Inc.* v. *Hodel*, 624 F. Supp. 1045, 1058 (D. Nev. 1985) (general clauses and phrases in statute are not concrete limits on agency authority).

We are not persuaded by the assertion that the TGA unambiguously precludes the permitted use rule by requiring recognition of the original grazing adjudications and thus the right to graze predictable numbers of stock. The TGA gives no hint, much less the unambiguous direction required by *Chevron*, that the issuance of a grazing permit by the Secretary requires permanent "recognition" of the numbers of stock authorized to graze in that permit. The dissent's attempt to find such a mandate in the command that "grazing privileges recognized and acknowledged shall be adequately safeguarded" is unavailing. In the dissent's view, the number of AUMs assigned to permits in the original grazing decisions results in "recognized and acknowledged" grazing privileges. Even if this were true, the statute does not provide unconditionally that grazing privileges shall always be "adequately safeguarded." Rather, such privileges will be adequately safeguarded *as long as they are consistent with the purposes and provisions of the TGA*, namely protecting the federal rangelands and ensuring their orderly use. 43 U.S.C. § 315b.[6]

---

[6] The dissent says that we "do[ ] not accord the statutory language much, if any, importance." Dissent at 1309. To the contrary, we find the statutory language to be of primary importance and note

In this regard, the notion that the statute recognizes rights to graze set numbers of stock is itself in direct conflict with the statutory mandate that the Secretary *shall* specify the numbers and stock and seasons of use *from time to time*. See *id.* Perpetuating grazing decisions handed down in the 1940s may well be inconsistent with the ongoing statutory command that the Secretary protect the federal lands, especially where the grazing decisions were largely made by the ranchers themselves.[7] In addition, the dissent's suggestion that Congress meant the numbers of stock set by the original grazing decisions to become an ongoing "grazing preference" appears to conflict with the statute's provision of permit periods not to exceed ten years. The mandatory renewal process contemplates that the *substance* of the grazing privilege, as opposed to the *preference right of renewal*, is to be periodically adjusted in accordance with the condition of the rangeland.

2. FLPMA

The Secretary's power to regulate grazing under the TGA must be read in conjunction with FLPMA, which represents Congress' recognition that previously enacted laws governing use of the federal lands had failed to provide adequately for their protection and enhancement. FLPMA

---

that the dissent here fails to explain how its interpretation of the TGA as requiring permanent recognition of the original grazing adjudications can be reconciled with the clear statement that any privileges the Secretary recognizes are to be so recognized only so far as consistent with the purposes and provisions of the Act.

[7] "Between 1934 and 1976, grazing regulation was limited, and the early regulations were actually the creation of the ranchers themselves." Pendery, *supra*, at 521 (citing Coggins & Lindeberg-Johnson, *supra*, at 55-60).

provides that "goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law." 43 U.S.C. § 1701(a)(7); see also *id.* § 1732(a) ("The Secretary shall manage the public lands under principles of multiple use and sustained yield * * *."). In addition,

> the public lands [must] be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; that will provide for outdoor recreation and human occupancy and use * * *.

Id. § 1701(a)(8). In other words, FLPMA requires that the public lands be managed for many purposes in addition to grazing and for many members of the public in addition to the livestock industry.

As noted above, in order to manage the lands in accordance with principles of multiple use and sustained yield, FLPMA mandates that "[l]and use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses." *Id.* § 1712(a) (emphasis added). As part of the land use planning process, FLPMA sets forth a detailed set of requirements governing the issuance by the Secretary of livestock grazing permits. All livestock grazing permits are issued subject to terms and conditions consistent with statutory purposes. *Id.* § 1752. FLPMA also requires the Secretary to specify the numbers of animals to be grazed and seasons of use in all

permits issued, either directly or by reference to an appropriate allotment management plan (AMP). See *Natural Resources Defense Council, Inc.*, 618 F. Supp. at 858-59 (holding permit issuance requirements are "very specific" and describing AMPs as "'basically land use plans tailored to specific grazing permits.'") (quoting George C. Coggins, *The Law of the Public Rangeland IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1, 24 (1983)).[8] The statute thus provides in relevant part:

> (a) Terms and conditions
>
> Except as provided in subsection (b) of this section, permits and leases for domestic livestock grazing on public lands issued by the Secretary * * * shall be for a term of ten years *subject to such terms and conditions the Secretary concerned deems appropriate and consistent with the governing law,* including, but not limited to, the authority of the Secretary concerned to cancel, suspend, or modify a grazing permit or lease, in whole or in part, pursuant to the terms and conditions thereof, or to cancel or suspend a grazing permit or lease for any violation of a grazing regulation or of any term or condition of such grazing permit or lease.
>
> * * *

---

[8] FLPMA defines an AMP as a document which "prescribes the manner in, and extent to, which livestock operations will be conducted in order to meet the multiple-use, sustained-yield, economic and other needs and objectives as determined for the lands by the Secretary concerned." 43 U.S.C. § 1702(k)(1).

> (d) Allotment management plan requirements
>
> All permits and leases for domestic livestock grazing issued pursuant to this section may incorporate an allotment management plan developed by the Secretary concerned * * *. Allotment management plans shall be tailored to the specific range condition of the area to be covered by such plan, and shall be reviewed on a periodic basis to determine whether they have been effective in improving the range condition of the lands involved or whether such lands can be better managed under the provisions of subsection (e) of this section * * *.
>
> (e) Omission of allotment management plan requirements and incorporation of appropriate terms and conditions; reexamination of range conditions
>
> *In all cases* where the Secretary concerned has not completed an allotment management plan or determines that an allotment management plan is not necessary for management of livestock operations and will not be prepared, the Secretary concerned *shall* incorporate in grazing permits and leases *such terms and conditions as he deems appropriate* for management of the permitted or leased lands pursuant to applicable law. The Secretary concerned *shall* also specify therein *the numbers of animals to be grazed and the seasons of use and that he may reexamine the condition of the range at any time* and, if he finds on re-examination that the condition of the range requires adjustment in the amount or other aspect of grazing use, that the permittee or lessee shall adjust his use to the extent the Secretary concerned deems necessary. Such readjustment shall be put into full force and effect on the date specified by the Secretary concerned.

Id. § 1752 (emphasis added).

As the statutory language makes clear, FLPMA unambiguously authorizes the Secretary to specify terms and conditions in livestock grazing permits in accordance with land use plans. Indeed, all livestock grazing permits are *required* either to incorporate an AMP or directly to specify the numbers of animals that may be grazed and the seasons of use. The overarching goal of the statute is to ensure that the Secretary's management of the lands is consistent with the principles of multiple use and sustained yield as developed in land use plans. See *Natural Resources Defense Council*, 618 F. Supp. at 875 (noting the "legislature's emphasis on the importance of land use planning caused the leading commentator to observe that Congress 'intended planning to be the centerpiece of future rangeland management' and 'binding on all subsequent multiple use decisions.'") (quoting Coggins, *supra*, at 15). The statute itself simply does not support the notion that once a grazing adjudication has been handed down it must be recognized for all time. To the contrary, the statute explicitly states that permits will in most cases be issued for ten years subject to the terms and conditions the Secretary concerned deems appropriate, and expressly provides the Secretary with authority at any time to adjust animal numbers upon reexamination of range conditions. PLC's and the dissent's position is without support in the language of the TGA, fails to acknowledge the Congressional purpose and plain language of FLPMA, and runs contrary to the elemental proposition that "an agency is not required to 'establish rules of conduct to last forever,' but rather 'must be given ample latitude to adapt [its] rules and policies to the demands of changing circumstances'." *Rust* v. *Sullivan*, 500 U.S. 173, 186-87 (1991) (internal quotation marks and citations omitted)

(quoting *Motor Vehicle Mfrs. Ass'n of United States, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983)).[9]

In sum, since the permitted use rule provides that grazing permits shall specify the numbers of stock and seasons of use according to the dictates of applicable land use plans, the rule is easily within the scope of the Secretary's authority under FLPMA so long as it does not conflict with the TGA's requirement that recognized and acknowledged grazing privileges be *adequately* safeguarded, the question to which we now turn.

C. Adequate Safeguards

In determining whether the 1995 regulations "adequately safeguard" grazing privileges as required by the TGA, see 43 U.S.C. § 315b, we must take particular note of the fact that to succeed on a facial challenge, PLC must demonstrate "that no set of circumstances exists under which the [regulation] would be valid." *Reno* v. *Flores*, 507 U.S. at 301 (alteration in original) (quoting *Salerno*, 481 U.S. at 745). Such a challenge "is, of course, the most difficult challenge to mount successfully," *Rust*, 500 U.S. at 183 (quoting *Salerno*, 481 U.S. at 745), and the PLC has not done so here.

First, the 1995 regulations provide exactly the same procedural safeguards that obtained under the previous regulations. The TGA requires the Secretary to "provide by appropriate rules and regulations for local hearings on

---

[9] In its discussion of whether the permitted use rule is consistent with the governing statutes, the dissent does not mention FLPMA. Dissent at 1314-15. The dissent thus fails to explain how permanent recognition of grazing adjudications dating back more than a half century could possibly be consistent with FLPMA's mandate that the Secretary must specify terms and conditions consistent with land use plans in every grazing permit.

appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department." 43 U.S.C. § 315h. As the Secretary points out, section 315h applies as much to the "permitted use" rule as it did to the previous "grazing preference." The new regulations similarly provide that "[a]ny person whose interest is adversely affected by a final decision of the authorized officer may appeal the decision for the purpose of a hearing before an administrative law judge." 43 C.F.R. § 4160.4 (1995). As such, any change in a privilege assigned through the permit process is safeguarded to the extent that parties aggrieved by the Secretary's decisions have the right to challenge them.

Second, while PLC argues that the permitted use rule will undermine the stability of the livestock industry, protection of which is a stated goal of the TGA, and that this represents a failure by the Secretary to adequately safeguard grazing privileges, this question is not ripe for consideration on a facial challenge. The Secretary argues and the record confirms that DOI believes the new regulation will actually increase stability, both because DOI does not envision yearly changes in land use plans and because elimination of the distinction between "active" and "maximum" use provides a more accurate account of the actual grazing capacity of a given allotment from year to year. See Final Rule, 60 Fed. Reg. at 9922-23; *id.* at 9928, 9931.[10] In any event, both

---

[10] The Secretary has stated the following with respect to the effect of the permitted use rule on the predictability of grazing use:

> In the absence of a major change in the overall situation and where [land use plan] objectives are being met, changes in permitted use through BLM initiative are unlikely. This provides a high level of security, stability and predictability from year to year.

sides' positions are necessarily speculative until the permitted use rule is actually applied.

Because this record provides no basis for the claim that there is no set of circumstances under which the 1995 regulations as they pertain to enforcement of the permitted use rule can be said to safeguard grazing privileges adequately, *Chevron* requires us to defer to the Secretary. We therefore hold the permitted use rule is fully within the Secretary's authority under the TGA and FLPMA and reverse the district court's holding to the contrary.

---

60 Fed. Reg. 9894, 9922-23 (Feb. 22, 1995).

> Permitted use is not subject to yearly change. Permitted use will be established through the land use planning process, a process which requires data collection and detailed analysis, the completion of appropriate NEPA documentation, and multiple opportunities for public input. Establishing permitted use through this planning process will increase, not decrease, the stability of grazing operations.

Id. at 9928.

> Although in some cases reductions made under this section of the rule may be carried in temporary suspension, the Department does not believe that it serves the best interest of either the rangeland or the operator to continue to carry suspended numbers on a permit, unless there is a realistic expectation that the AUMs can be returned to active livestock use in the foreseeable future.

Id. at 9931.

III.

TITLE TO PERMANENT RANGE IMPROVEMENTS

In our judgment, the relevant provisions of the TGA and FLPMA permit the Secretary to promulgate the 1995 regulation under which the United States takes title to all future permanent range improvements constructed under cooperative agreements. Contrary to the dissent's assertion, nothing in the statutory language directs where such title must lie. "If a statute is 'silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'" *Rust*, 500 U.S. at 184 (quoting *Chevron*, 467 U.S. at 842-43). Moreover, although the new rule represents a departure from prior practice, we are convinced the Secretary provided a reasoned basis for the change. See *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 42.

In evaluating whether the TGA permits the government to assert title to all permanent improvements, we must once again place the statutory language in the foreground, keeping in mind our duty to defer to the Secretary's interpretation unless it conflicts with an unambiguous statutory mandate. See *Chevron*, 467 U.S. at 843-44. Here, the Secretary's broad discretion to implement the Act is immediately clear not only from silences in the statute but from its explicit discretionary language. The TGA mandates that the Secretary

> shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of section 315 of this title, and he shall make such rules and regulations and establish such service, *enter into such cooperative agreements, and do any and all things necessary* to accomplish the purposes of this subchapter and to insure the objects of such grazing districts * * *.

43 U.S.C. § 315a. It is apparent from the phrases "*such* rules and regulations," "*such* cooperative agreements," and "*any and all things necessary,*" that the means the Secretary may employ to accomplish the purposes of the Act are nearly completely at his discretion.

Most significant for purposes of analyzing the validity of the range improvements rule is section 315c of the TGA, which provides:

> Fences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock *may* be constructed on the public lands within such grazing districts *under permit issued by the authority of the Secretary, or under such cooperative arrangements as the Secretary may approve.* * * * No permit shall be issued which shall entitle the permittee to the use of *such improvements constructed and owned by a prior occupant* until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior.

43 U.S.C. § 315c (emphasis added). Under the plain language of section 315c, the Secretary has discretionary authority to decide whether to allow necessary range improvements (e.g., he "may" allow construction). He may issue permits *or* he may authorize construction under "such cooperative agreement" as he "may approve."

With this discretionary statutory language apparently in mind, the Secretary issued the challenged regulation making all permanent range improvements subject to cooperative

agreements and providing prospectively that title to these improvements would be in the United States. The regulation provides in relevant part:

> (a) The Bureau of Land Management may enter into a cooperative range improvement agreement with a person, organization, or other government entity for the installation, use, maintenance, and/or modification *of permanent range improvements or rangeland developments to achieve management or resource condition objectives. The cooperative range improvement agreement shall specify how the costs or labor, or both,* shall be divided between the United States and cooperator(s).

43 C.F.R. § 4120.3-2(a) (1995) (emphasis added).

> (b) Subject to valid existing rights, title to permanent range improvements such as fences, wells, and pipelines where authorization is granted after August 21, 1995 shall be in the name of the United States. The authorization for all new permanent water developments such as spring developments, wells, reservoirs, stock tanks, and pipelines shall be through cooperative range improvement agreements.

Id. § 4120.3-2(b). These regulations are fully consistent with the discretionary authority to issue range improvement permits accorded the Secretary under the TGA.

The position advanced by the dissent that permittees must be allowed to own improvements they wholly or partially construct because the TGA *unambiguously* requires it is simply incorrect. The dissent begins its analysis of the statutory language by asserting the TGA unambiguously requires that title to structural improvements constructed and paid for by permittees must be held by the permittees.

Dissent at 1317. The language upon which the dissent relies states that "[n]o permit shall be issued which shall entitle the permittee to the use of such improvements [fences, wells, reservoirs, and other improvements] *constructed and owned by a prior occupant* until the applicant has paid to such prior occupant the reasonable value of such improvements." 43 U.S.C. § 315c (emphasis added). According to the dissent, "[t]he phrase 'such improvements constructed and owned by a prior occupant' plainly indicates * * * that when a permittee constructs an authorized improvement, he or she holds title to that improvement." Dissent at 1317.

We do not agree that the quoted language unambiguously requires the meaning the dissent attributes to it. The dissent takes the words "such improvements constructed and owned" to unambiguously mean "constructed and [therefore] owned." The statutory language, however, does not mandate this reading, as evidenced by the need to add the word "therefore" to achieve the result the dissent desires. The statute can just as plausibly be construed to say no more than *if* the Secretary allows a permittee *both* to construct *and* own an improvement, the permittee shall be entitled to compensation for its reasonable value upon transfer. Nothing in the unadorned statutory language *requires* the Secretary to allow a permittee to own an improvement he has constructed, although if the Secretary in his discretion allows ownership, the statute requires compensation. While the language at issue may allow the dissent's reading of it, the entire payment provision can also equally be viewed as purely conditional, operative only if the Secretary allows both construction and ownership.

Moreover, an examination of section 1752(g) of FLPMA gives a clear indication that Congress did not view section 315c as necessarily vesting title to improvements constructed by permittees. Section 1752(g) provides:

> Whenever a permit or lease for grazing domestic livestock is canceled in whole or in part, in order to devote the lands covered by the permit or lease to another public purpose, including disposal, the *permittee or lessee shall receive from the United States a reasonable compensation for* the adjusted value, to be determined by the Secretary concerned, of his *interest* in *authorized permanent improvements placed or constructed by the permittee or lessee on lands covered by such permit or lease* * * *.

43 U.S.C. § 1752(g) (emphasis added). Here the permittee has an "interest" in, rather than ownership of, permanent improvements he constructs. That this provision was even considered necessary in order to ensure that permittees who construct permanent improvements would be compensated upon cancellation of their permits by the United States belies the suggestion that a permittee is considered to own title to an improvement merely because he constructs it.

Previous versions of the regulations refute the claim that "constructed and owned" vests obvious and automatic title. The 1978 regulations provided that the United States would hold title to all improvements constructed according to cooperative agreements, whereas permittees would hold title to all improvements constructed according to range improvement permits. See 43 C.F.R. §§ 4120.6-2 to -3 (1978). The dissent's construction is, quite simply, not the only one the language supports.[11]

---

[11] The dissent's citation of the district court's order is revealing in this regard. The district court asserted that section four of the Taylor Act *"strongly suggests* that the individual who constructed the improvement should own it." Dissent at 1316-17 (emphasis added). However, even if this were true, a "strong suggestion" is not the same as a statutory mandate that has one, and only one, possible meaning. Furthermore, although the dissent says that we have "insert[ed]" an ambiguity into the statute where none exists, we note that the dissent has made absolutely no effort to explain why the incorporation of the phrase "constructed and owned" necessarily required that permittees have automatic title to improvements placed on federally owned lands that can be constructed in the first instance only if the Secretary chooses to allow it. We do not disagree with the dissent that "Congress expressed its will on the issue at hand." Dissent at 1317. However, we are convinced that Congress intended for the Secretary to decide when range improvements should be allowed and that he can decide that the United States should own title to permanent range improvements under his mandate to do "any and all things necessary" to accomplish the TGA's purposes.

In our view, therefore, nothing in the Act precludes the Secretary from requiring that all permanent improvements be constructed under cooperative arrangements and all removable improvements be constructed under permits. The language in section 315c requiring payment for improvements "constructed and owned" by a prior occupant is not rendered meaningless, as the dissent argues, under this regulatory scheme because the provision will still apply to temporary improvements and require a transferee to pay the transferor for such improvements before using them. See Dissent at 1317. As such, the dissent's interpretation is just that, its own interpretation.[12]

---

[12] It is worth noting that the regulatory scheme ensures compensation to permittees for their interest in permanent range improvements regardless of who holds title. Section 4120.3-2(b) provides "[a] permittee's or lessee's interest in contributed funds, labor, and materials [to permanent range improvements] will be documented by the Bureau of Land Management to ensure proper credit for the purposes of §§ 4120.3-5 and 4120.3-6(c)." 43 C.F.R. § 4120.3-2(b). Section 4120.3-5 in turn provides that a

Since the 1995 range improvements rule is based on a permissible interpretation of the TGA, we must defer to the rule unless the government failed to provide a reasoned basis for modifying the previous regulations.

> [A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

State Farm Mut. Auto. Ins. Co., 463 U.S. at 43.

The government provided several explanations for the changes,[13] any one of which would be sufficient to meet this

---

grazing preference transfer will not be approved "unless the transferee has agreed to compensate the transferor for his/her interest in the authorized improvements within the allotment." *Id.* § 4120.3-5. Section 4120.3-6(c) likewise provides that when a grazing permit is canceled, "the permittee or lessee shall receive from the United States reasonable compensation for the adjusted value of their interest in authorized permanent improvements placed or constructed by the permittee or lessee on the public lands covered by the concealed permit or lease." *Id.* § 4120.3-6(c).

[13] Although the 1995 range improvements regulations are a departure from the rules previously in effect, the Secretary is not, as PLC suggests, departing from 61 years of uniform policy with regard to designation of title. As noted above, the 1978 regulations provided that the United States would hold title to all improvements constructed according to cooperative agreements, whereas permittees would hold title to all improvements

narrow standard of review. The Secretary first asserts that management of permanent improvements according to FLPMA's multiple-use and sustained-yield mandate would be simplified if BLM could avoid having to negotiate with permittees as titleholders to permanent improvements. Given the fact that multiple-use and sustained-yield management is central to FLPMA and requires that the Secretary have considerable administrative flexibility, the Secretary's basis for the change is reasonable. Equally reasonable is BLM's assertion that the change would unify procedures for authorizing improvements between BLM and the Forest Service given that many permittees use land administered by both agencies and both agencies have the same goals with respect to ecosystem management so far as consistent with the specific terms of their respective governing statutes. Finally, the new regulation clarifies a confusing overlap in the prior rule, under which certain improvements could fall under the category providing for shared title as well as the category granting full title to the United States.

In view of these justifications and in light of the fact that permittees will continue to receive the identical compensation they received under the prior rule upon cancellation or transfer of a permit, we hold the 1995 range improvements rule valid. See *Rust*, 500 U.S. at 187.

---

constructed according to range improvement permits. See C.F.R. §§ 4120.6-2 to -3 (1978). These regulations did not designate which improvements would be constructed under which authorization scheme. *Id.* Moreover, the 1981 regulations provided that permittees under a range improvement permit "shall have title to *removable* range improvements," not permanent ones. 43 C.F.R. § 4120.6-3(b) (1981). Thus, PLC cannot credibly assert that permittees have always held title to structural improvements which they built and paid for, at least not by way of regulatory mandate.

IV.

THE QUALIFICATIONS RULE

We now turn to the Secretary's new qualifications rule. Under the pre-1995 regulations, in order to qualify for a grazing permit, an applicant had to "be engaged in the livestock business," in addition to other requirements. 43 C.F.R. § 4110.1 (1994). The 1995 version of section 4110.1 eliminates that requirement. The district court set this regulation aside, concluding that "Congress intended for the Taylor Grazing Act to benefit people actually engaged in the livestock business," 929 F. Supp. at 1445 (citing legislative history), and that "[f]rom the beginning the Department of Interior consistently granted grazing permits and leases only to applicants engaged in the livestock business," *id.* (citing agency decisions). Because the TGA does not require applicants to be engaged in the livestock business to qualify for a grazing permit, however, we reverse the district court's invalidation of this regulation.

Section three of the TGA authorizes the Secretary–

> to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range * * *. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them * * *.

43 U.S.C. § 315b. Where possible, we will give effect to the plain meaning of the words chosen by Congress. See *Bartlett* v. *Martin Marietta Operations Support, Inc.*, 38 F.3d 514, 518 (10th Cir. 1994) ("The court is obliged to give terms their plain meaning whenever possible."). The language here is absolutely clear. Contrary to PLC's argument, the statute only requires that the Secretary give "preference" to "landowners engaged in the livestock business," among others. While this preference does require the Secretary to consider the applications of "landowners engaged in the livestock business" before most other applications, there is not even a colorable argument that this language *requires* the Secretary to issue grazing permits *only* to those engaged in the livestock business. In fact, landowners engaged in the livestock business are not even the only group entitled to this preferential treatment. As quoted above, the TGA also includes "bona fide occupants and settlers, and owners of water or water rights" as other groups entitled to the preference. We refuse to read into the language of the TGA a requirement that does not exist.

PLC asks us to examine the legislative history of the TGA in deciding this issue. PLC spends several pages in its brief expounding on this history to support its argument that "Congress intended and assumed that only persons in the livestock business, whether local settlers or outsiders, would be able to graze the public lands." Appellees' Br. at 41. If Congress intended that only persons in the livestock business should be able to graze the public lands, in the statute itself Congress would have required the Secretary to limit the issuance of permits to that class of applicants. Courts should not resort to legislative history in order to ascertain Congress's intent when the plain language of the statute is unambiguous. See *United States* v. *Gonzales*, 520 U.S. 1 (1997) ("Given [a] straightforward statutory command, there is no reason to resort to legislative history."); see also *Bank*

One Chicago v. *Midwest Bank & Trust Co.*, 516 U.S. 264 (1996) (Scalia, J., concurring) ("The law *is* what the law *says*, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it."). We therefore do not consider the legislative history of the TGA on this issue.

PLC also asserts that the Secretary's removal of the "engaged in the livestock business" requirement must be supported by a "reasoned analysis" because it rejects 61 years of DOI interpretation of the TGA. When an agency departs from a prior interpretation of a statute that it is charged with implementing, the agency must justify the change of interpretation with a "'reasoned analysis.'" See *Rust*, 500 U.S. at 187 (quoting *Motor Vehicle Mfrs. Assoc.* v. *State Farm*, 463 U.S. 29, 42 (1983)). However, we need not decide whether reasoned analysis supports the agency's change where, as in this case, we determine that the statutory language at issue is unambiguous and that it supports the new regulation. See *Chevron*, 467 U.S. at 842 ("If the intent of Congress is clear, that is the end of the matter * * *."); cf. *Rust*, 500 U.S. at 184, 187 (engaging in reasoned analysis discussion only after concluding that the plain language of the statute at issue was ambiguous). In such a case, the agency is simply "giv[ing] effect to the unambiguously expressed intent of Congress," *Chevron*, 467 U.S. at 843, and we do not reach the second step of *Chevron* (i.e., determining whether the regulation is based on a permissible construction of the statute). In the TGA, Congress only gives "landowners engaged in the livestock business" a preference in the issuance of permits. 43 U.S.C. § 315b. It does not require the Secretary to issue permits exclusively to such applicants. The Secretary's revised qualifications rule gives proper effect to this unambiguous statutory language and is not contrary to any statutory requirement.

V.

THE CONSERVATION USE RULE

Next, we examine whether the Secretary exceeded statutory authority by allowing the issuance of ten-year permits to use public lands for conservation purposes to the exclusion of livestock grazing. If no set of circumstances exists under which the regulation would be a valid exercise of the Secretary's authority, we must strike down the regulation as invalid on its face. See 5 U.S.C. § 706(2)(C); *Salerno*, 481 U.S. at 745.

Section three of the TGA authorizes the Secretary "to issue or cause to be issued permits to graze livestock" on the public lands. 43 U.S.C. § 315b. In the 1995 regulations, the Secretary has authorized the issuance of grazing permits or leases for "livestock grazing, suspended use, and conservation use." 43 C.F.R. § 4130.2(a) (1995). Conservation use, in turn, is defined as "an activity, *excluding livestock grazing*, on all or a portion of an allotment" for conservation purposes. 43 C.F.R. § 4100.0-5 (1995) (emphasis added). Thus, the Secretary has authorized the issuance of a grazing permit to an individual or group who will not graze livestock for the entire duration of a permit.

The Secretary makes several arguments in support of the new regulation allowing "conservation use" permits. First, he points out (and PLC agrees) that resting land is a perfectly acceptable practice on the public range and is done with regularity in order to prevent permanent destruction of the lands. Indeed, under the pre-1995 regulations, active use could "be suspended in whole or in part on a temporary basis due to drought, fire, or other natural causes, or to facilitate installation, maintenance, or modification of range improvements." 43 C.F.R. § 4110.3-2(a) (1994). The

Secretary asserts that the issuance of grazing permits for conservation use merely reflects "a longstanding grazing management practice consistent with the resumption of grazing."

The Secretary further argues that the issuance of permits for conservation use is authorized by the TGA, FLPMA, and PRIA. The Secretary points to section two of the TGA, which provides, "The Secretary shall * * * do any and all things necessary to accomplish the purposes of this [Act]." 43 U.S.C. § 315a. One of the purposes of the TGA is "to preserve the land and its resources from destruction or unnecessary injury." *Id.* The Secretary asserts that issuance of permits authorizing conservation use is fully consistent with this mandate. Moreover, FLPMA charges the Secretary with "manag[ing] the public lands under principles of multiple use and sustained yield." 43 U.S.C. § 1732(a). Multiple use requires that the Secretary consider, among other things, "the long-term needs of future generations for renewable and non-renewable resources." 43 U.S.C. § 1702(c). The Secretary argues that the issuance of conservation use permits helps achieve the goal of multiple use. Similarly, the Secretary contends that conservation use is a mechanism to achieving PRIA's goal of "manag[ing], maintain[ing], and improv[ing] the condition of the public rangelands so they become as feasible as possible for all rangeland values." 43 U.S.C. § 1901(b)(2).

Notwithstanding the reasonable arguments that the Secretary presents, we are not persuaded. The question before us is not whether the Secretary possesses general authority to take conservation measures–which clearly he does–but rather, whether he has authority to take the specific measure in question, i.e., issuing a "grazing permit" that excludes livestock grazing for the entire term of the permit. We conclude at the first step of the *Chevron* analysis that

Congress has spoken directly to this precise question and answered it in the negative.

Our decision rests on the plain language of the relevant statutes. The TGA provides the Secretary with authority to issue "permits to graze livestock on * * * grazing districts." 43 U.S.C. § 315b. That statute does not authorize permits for any other type of use of the lands in the grazing districts. FLPMA and PRIA confirm that grazing permits are intended for grazing purposes only. Both those statutes define "grazing permit and lease" as "any document authorizing use of public lands * * * *for the purpose of grazing domestic livestock.*" 43 U.S.C. §§ 1702(p), 1902(c) (emphasis added). Thus, the TGA, FLPMA, and PRIA each unambiguously reflect Congress's intent that the Secretary's authority to issue "grazing permits" be limited to permits issued "for the purpose of grazing domestic livestock." None of these statutes authorizes permits intended exclusively for "conservation use." The Secretary's assertion that "grazing permits" for use of land in "grazing districts" need not involve an intent to graze is simply untenable.

The TGA authorizes the Secretary to establish grazing districts comprised of public lands "which in his opinion are chiefly valuable for grazing and raising forage crops." 43 U.S.C. § 315. When range conditions are such that reductions in grazing are necessary, temporary non-use is appropriate and furthers the preservation goals of the TGA, FLPMA, and PRIA, even when that temporary non-use happens to last the entire duration of the permit. BLM may impose temporary reductions, see 43 C.F.R. § 4110.3-2 (1994), or permittees may voluntarily reduce their grazing levels. The presumption is, however, that if and when range conditions improve and more forage becomes available, permissible grazing levels will rise. See, e.g., 43 C.F.R. § 4110.3-1(a) (1994) ("Additional forage temporarily

available for livestock grazing use * * * may be apportioned on a nonrenewable basis."); *id.* § 4110.3-1(b) (providing that additional forage would first be apportioned "in satisfaction of grazing preferences" to permittees authorized to graze in the allotment containing the forage). The Secretary's new conservation use rule reverses that presumption. Rather than annually evaluating range conditions to determine whether grazing levels should increase or decrease, as is done with temporary non-use, the Secretary's conservation use rule authorizes placement of land in non-use for the entire duration of a permit. This is an impermissible exercise of the Secretary's authority under section three of the TGA because land that he has designated as "chiefly valuable for grazing livestock" will be completely excluded from grazing use even though range conditions could be good enough to support grazing. Congress intended that once the Secretary established a grazing district under the TGA, the primary use of that land should be grazing.

Thus, when the Secretary issues a permit under section three of the TGA, the primary purpose of the permit must be grazing. If range conditions indicate that some land needs to be rested, the Secretary may place that land in non-use on a temporary basis, in accordance with Congress's grants of authority that the Secretary manage the public lands "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, [and other] values," 43 U.S.C. § 1701(a)(8), or he may reduce grazing on that land, see 43 C.F.R. § 4110.3-2 (1994) (providing that active use may be temporarily suspended in whole or in part for various reasons); *id.* § 4110.3-3 (describing procedures for implementing changes in active use). The Secretary may also employ other means to ensure that the resources of the public range are preserved. See, e.g., 43 U.S.C. § 1752(d) (stating that grazing permits may incorporate an allotment management plan); *id.* § 1702(k) (defining allotment

management plan as a document which "prescribes the manner in, and extent to, which livestock operations will be conducted in order to meet the multiple-use, sustained-yield, and other needs and objectives" of the land).

In short, it is true that the TGA, FLPMA, and PRIA, give the Secretary very broad authority to manage the public lands, including the authority to ensure that range resources are preserved. Permissible ends such as conservation, however, do not justify unauthorized means. We hold that the Secretary lacks the statutory authority to issue grazing permits intended exclusively for conservation use. Because there is no set of circumstances under which the Secretary could issue such a permit, the new conservation use regulation is invalid on its face. See 5 U.S.C. § 706(2)(C); *Salerno*, 481 U.S. at 745.

VI.

CONCLUSION

An examination of the statutes Congress has enacted to guide administration of the range land at issue in this case makes it abundantly clear that Congress intended the federal lands to be managed in such a way as to maximize their use for many purposes. There can be no doubt that Congress has vested the Secretary of the Interior with broad authority to decide entitlement to the grazing rights on the range as long as he does not exercise it contrary to clear Congressional mandates. Having considered Congressional intent as expressed in the TGA, FLPMA and PRIA and our deferential role as a reviewing court, we **REVERSE** the district court's invalidation of the permitted use rule, the range improvements rule, and the qualifications rule, and we **AFFIRM** the district court's invalidation of the conservation use rule.

TACHA, Circuit Judge, dissenting.

I dissent from parts II and III of the majority opinion.

I. Permitted Use Rule

With respect to the new permitted use rule, I fundamentally disagree with the majority on the meaning and importance of the statutory command that "[s]o far as consistent with the purposes and provisions of [the Taylor Grazing Act], *grazing privileges recognized and acknowledged shall be adequately safeguarded* * * *." 43 U.S.C. § 315b (emphasis added). In my judgment, this statutory command requires the Secretary to continue to recognize permittees' adjudicated grazing levels, called the "grazing preference" in the pre-1995 regulations. The majority does not accord the statutory language much, if any, importance, and finds it to be ambiguous at best, meaningless at worst. The majority also concludes, I think erroneously, that adjudicated grazing levels have not been " 'recognized' under any regulations promulgated since the enactment of FLPMA" in 1977. Maj. op. at 1298.

This issue is a highly complicated issue to review because it is virtually impossible to adequately understand the mechanics of grazing on the public range and how it is administered from a reading of the relevant regulations. Even upon reading the briefs, cited authorities, BLM decisions, and scholarly commentaries on the public lands, one is left with a rather incomplete comprehension of the system. Nevertheless, as thorough an understanding as possible of how the grazing preference system has worked since its inception in 1934 is essential for our proper review.

A. Historical Role of the Grazing Preference

At the time the TGA was passed in 1934, there were many more applicants for grazing privileges than could be accommodated, a fact that Congress knew. See H.R. REP. No. 73-903, at 1 (1934) (stating that the public lands "are now being used without supervision or regulation, and there is constant competition among the various users who desire to obtain exclusive benefit of the forage growth."). Congress charged the Secretary with fairly and orderly allocating grazing privileges on the public lands. It was clear that whatever system the Secretary installed would result in recognizing privileges for certain applicants to graze on the public lands while denying privileges to other applicants. To guide the Secretary in this process, Congress articulated which groups were to receive first priority in the distribution of permits. See 43 U.S.C. § 315b ("Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights * * *."). The Secretary must engage in that process even today when new lands become open for grazing. See, e.g., *Webster* v. *BLM*, 97 I.B.L.A. 1 (1987) (reviewing grazing application regarding lands that came under BLM control in 1984).

Following the TGA's passage in 1934, the Secretary began the lengthy adjudicatory process of allocating grazing privileges. That process took many years to complete. When the Secretary made a favorable decision on a grazing application, he (1) issued a permit to the applicant, (2) identified the property owned by the permittee that was to serve as the base for the livestock operation and to which the grazing privileges attached, and (3) identified the maximum amount of forage, expressed in AUMs, that the permittee could graze on the public lands. *Cf.* Federal Range Code,

§ 6(b) (1938) (describing priority of issuance of grazing permits to qualified applicants). That maximum amount of forage eventually became known as the grazing preference, although that term was not added to the grazing regulations until 1978. See 43 C.F.R. § 4100.0-5(*o*) (1978).

The grazing preference, or the historically adjudicated grazing level, was distinct from the permit to graze. The permit was the ten-year license granted to the applicant, giving him the right to graze livestock on the public range up to the amount of forage allocated by the Secretary. The grazing preference was the Secretary's maximum allocation of forage to the individual permittee and was in most cases, if established prior to 1978 (as most preferences were), based on either the permittee's historical use of public range or the historically available forage on the permittee's private lands, whichever was lower. See *McLean* v. *BLM*, 133 IBLA 225, 231-32 & nn.9-10 (1995). There is no question that FLPMA and the 1978 regulations altered the criteria for awarding new preferences and increasing already-existing preferences, see *id.* at 235, but there is also no question, contrary to the majority's assertion, that the 1978 regulations continued to recognize already-existing grazing preferences, see 43 Fed. Reg. 29,058 (July 5, 1978) (stating that permittees' "adjudicated grazing use, their base properties, and their areas of use (allotments) will be recognized under these grazing regulations.").

The grazing preference never guaranteed a permittee the right to graze that amount of forage every year. Rather, the grazing preference represented the upper limit of forage that the permittee could graze if enough forage were available. Under the 1978 regulations, a permittee's grazing preference included both "active use" and "suspended use." 43 C.F.R. § 4110.2-2(a) (1994). A permittee's active use could fluctuate over time based on available forage and the

carrying capacity of the land. Active use could be reduced if grazing was causing an "unacceptable level or pattern of utilization or exceed[ed] the livestock carrying capacity," *id.* § 4110.3-2(b), and could be suspended in whole or in part on a temporary basis due to drought, fire, or other natural causes, or to facilitate range improvements, see *id.* § 4110.3-2(a). Similarly, should additional forage become available, a permittee's active use could increase up to the amount of the grazing preference. *Id.* § 4110.3-1(a),(b). In short, the grazing preference represented the upper limit that a permittee could graze if optimal conditions prevailed, all relevant land could be placed in active use, and the Secretary allowed him or her to graze up to that upper limit.

Under the 1978 regulations, the Secretary could change the maximum amount of forage represented by the grazing preference on a case-by-case basis. See 43 C.F.R. § 4110.3 (1994); *Gordon* v. *BLM*, 140 IBLA 112 (1997) (addressing BLM's 1992 decision to reduce grazing preference of permittee who, according to BLM, had lost control of his base property). A decision by the authorized officer to change a permittee's grazing preference had to be supported by rangeland studies conducted over time, unless the change was "either specified in an applicable land use plan or necessary to manage, maintain or improve rangeland productivity." 43 C.F.R. § 4110.3 (1994); see also *id.* § 4110.4-2 (providing for cancellation or suspension of grazing preference upon decrease in public land acreage available for grazing). Thus, under the prior regulations, changes in a grazing preference were based either on the individual circumstances of a particular permittee–e.g., in response to a change in the permittee's control over the base property–or on the condition of particular grazing allotments–e.g., if a reduction in grazing was necessary to improve rangeland productivity.

The grazing preference served as a stabilizing force for the livestock industry and promoted orderly use of the range by guaranteeing permittees the right to graze a predictable number of stock on the public lands and by allowing them to gauge how large or small their livestock operations could be. Stabilization of the livestock industry and promoting orderly use of the range were two of the primary purposes of the TGA. See TGA preamble, 48 Stat. 1269 (uncodified). Possession of a grazing preference attached to qualified base property guaranteed a rancher in possession of a permit the right to graze forage up to the amount specified by the preference so long as forage was available. The fact that a permittee's authorized active use might differ from the total forage in the grazing preference did not remove the certainty that accompanied the preference. Permittees knew and understood that there would be year-to-year fluctuations in available forage and changes in the overall conditions of the range, and the Secretary had full authority under the TGA to make individual adjustments in active use. See 43 U.S.C. § 315b (providing that the Secretary "shall specify from time to time numbers of stock and seasons of use."). Nonetheless, the grazing preference guaranteed permittees a right to graze from year to year those amounts of forage that the Secretary actually authorized and provided them with the certainty that if forage were abundant, grazing up to their preference limit would be authorized.

Despite annual fluctuations in active use, the preference level generally remained the same from year-to-year, through transfers of the base property, and from permit-to-permit, though there is no question that the Secretary could also effect changes in preference levels as described above. Such authority to change preference levels was in accord with section three of the TGA, which gives the Secretary the authority to "specify from time to time numbers of stock and seasons of use." 43 U.S.C. § 315b. At the end of the

permit's term, if the Secretary renewed the permit, the permittee again had the right to graze on the public lands in accordance with the grazing preference. Thus, the grazing preference remained in place not just from year-to-year within the ten-year term of the permit, but also from permit-to-permit. Grazing preferences could be transferred from one qualified permittee to another qualified permittee, and they were often pledged as security for loans taken out by permittees.

Based on my historical understanding of grazing preferences and the importance that they assumed in the operation of permittees' livestock businesses, I can only conclude that these adjudicated grazing levels, whether referred to by the label "grazing preference" or by any other name, were an essential part of the permittees' grazing privileges. Section three of the TGA gives permittees a preferential right of renewal of their permits; in my judgment, the adjudicated grazing levels are part and parcel of that preferential renewal right. In making the grazing decisions, the Secretary determined that certain permittees were entitled to priority in the issuance of permits and that, based on their historic use of the range, they were entitled to graze up to a quantifiable level of forage. When the Secretary reviewed grazing permits for renewal, he was guided by the original adjudications in which he had determined that the permittee was a preferred applicant and in which he identified the maximum forage level that the permittee was entitled to graze.

The Secretary issued those individualized adjudications after engaging in a long process of collecting data, reviewing applications, accepting the recommendations of local grazing advisory boards, and determining whether the applicant was entitled to priority in the issuance of a permit. In issuing grazing decisions, the specific allocation of forage was

recorded in the Secretary's logs. The Secretary undertook that process to satisfy its statutory obligation to issue grazing permits according to the priorities articulated by Congress in section three of the statute. The Secretary particularized each grazing decision to the individual permittee. Since the issuance of those original grazing decisions, changes to the grazing preferences have occurred on a case-by-case basis, subject to the Secretary's detailed regulatory requirements. See 43 C.F.R. § 4110.3 (1994) (describing process for making changes in grazing preference status); *Miller* v. *BLM*, 118 IBLA 354 (affirming Secretary's denial of increases in permittees' grazing preferences). I conclude that those grazing adjudications are an integral part of permittees' grazing privileges.

B. Grazing Adjudications Continued in 1978 Regulations

At least two statements from the majority's opinion demonstrate that we clearly do not share the same understanding of the issue before us today, particularly regarding the nature and role of the grazing adjudications. In discussing FLPMA and the 1978 regulations promulgated thereafter, the majority states that "[w]hile the previously adjudicated grazing uses were to be recognized *for the length of existing permits*, 'future adjudications of grazing use would be based on criteria vastly different than those provided in the Federal Range Code.'" Maj. Op. at 1295-96 (quoting Interior Board of Land Appeals decision, *McLean* v. *BLM*, 133 IBLA 225 (1995)). The majority also states that "[n]owhere in the 1978 regulations was there any requirement, or even the suggestion, that the authorizing officer must recognize or refer to the original grazing adjudications, *or even the most recent adjudications*, in issuing new permits." Maj. Op. at 1296 (emphasis added). The italicized portions, in particular, demonstrate that the

majority thinks that under the new regulations, each time a ten-year permit is renewed, the Secretary somehow engages in a new "adjudication."

As I understand it, this has never been the case, as the discussion above indicates. Rather, a grazing adjudication was a one-time decision of the Secretary, made when he first allocated grazing privileges on a particular allotment of the public range. Historically, there were many more applicants for use of the range than could be accommodated, so the Secretary had to grant grazing privileges to some and deny privileges to others. The adjudicatory process of allocating those privileges took nearly two decades. Thereafter, the Secretary engaged in that same type of adjudicatory process only when new public lands became available for grazing. In determining which applicants were to receive grazing privileges, the Secretary determined whether the applicant was a member of a preferred group listed in section three of the TGA, and evaluated the amount of forage on the public lands the applicant had typically used. Then, the Secretary issued a decision, issuing a grazing permit *and also* declaring the maximum level of forage the permittee could graze (i.e., the grazing preference). When a permit came up for renewal, the Secretary either renewed the permit in accordance with the grazing preference, or he denied the permit. Based on my understanding of this system, I can only conclude that the historically adjudicated grazing preference is an integral aspect of a permittee's grazing privileges, and in particular the "preference right of the permittees to renewal" of their permits, referred to in section three of the TGA.

I agree with the majority that passage of FLPMA and the 1978 regulations drastically changed the criteria that were to guide the Secretary in future adjudications. Indeed, the majority cites an Interior Board of Land Appeals decision that makes that point convincingly. See Maj. Op. at 1296

(quoting *McLean*, 133 IBLA at 233). The majority, however, simply does not understand what that means. A "future adjudication," as that phrase was used in the *McLean* decision, does not refer to the renewal of a grazing permit, as the majority asserts, nor to future decisions by the Secretary respecting allotments on public lands already under BLM control and with respect to which an adjudication has already occurred. Rather, a "future adjudication" is a post-1978 decision made by the Secretary to allocate permanent grazing privileges to various applicants when *new* lands come under BLM control and become available for grazing. *McLean* v. *BLM* illustrates well my point. There, the appellants had applied for a substantial increase in their active use in an allotment in which additional forage had become availabile for grazing. See *McLean*, 133 IBLA at 226. That allotment was under BLM control and was already open to grazing. Thus, the Secretary had already allocated grazing privileges on that land and adjudicated maximum grazing levels. Because the appellants were already making full use of their grazing preference in the allotment, their request was denied. In accordance with the 1978 regulations, the BLM Area Manager then allocated the newly available forage in the allotment to other permittees who were not making full use of their grazing preferences. The Area Manager's decision to increase those permittees' active use was not an "adjudication." Rather, the Area Manager increased the other permittees' active use up to their fully authorized and previously adjudicated grazing levels (i.e., their grazing preferences). Those grazing preferences had been determined in a prior grazing adjudication. Indeed, the *McLean* case makes clear that the appellants' grazing preference dated from an adjudication that occurred at least no later than 1970, and more likely well before that. See *id.* at 227. The *McLean* case also makes clear that a "future adjudication" (i.e., a post-1978 adjudication) only occurs

when completely new land comes within BLM control, and numerous applicants vie for the right to graze that land. In *McLean*, new land had not become available; rather, land already under BLM control and open to grazing saw increased levels of forage. The Secretary did not engage in a new adjudication to allocate that forage, but instead increased the active use of those permittees already with grazing privileges in that allotment in proportion to the preference levels previously adjudicated.

The *McLean* decision makes clear that most permittees' grazing preferences arose in pre-1978 grazing adjudications since most BLM land was opened to grazing immediately following the TGA's passage in 1934. Some grazing preferences derived from post-1978 adjudications, when new land became available for grazing. In either case, however, the only difference is the criteria that guided the Secretary in allocating the grazing privileges. Both sets of grazing preferences derived from grazing adjudications and were individualized to particular permittees. An original grazing decision awarded forage use according to a particular permittee's application for a grazing permit. If a permittee's grazing permit were renewed at the end of the life of the permit, the adjudicated grazing preference generally continued unchanged in that new permit. In most cases, recognition of the results of the original grazing decisions continued up to the 1995 revisions. See, e.g., *Ortiz* v. *BLM*, 126 I.B.L.A. 8, 9 (1993) (discussing permittee's grazing preference which, despite numerous transfers, "dates from the early 1930s," when it was issued to the original applicant). In the time since BLM issued an original grazing decision, changes in grazing preferences have been individualized, based on the circumstances of particular permittees and the condition of particular grazing allotments. Thus, until the 1995 regulations, the Secretary had safeguarded the results of the original grazing adjudications

through continued recognition of the original grazing preference.

C. Effect of the Secretary's New "Permitted Use" Regulation

The Secretary's new permitted use rule ends the long-standing DOI recognition of the adjudicated levels of grazing known as the grazing preference. The Secretary argues that "AUMs are *protected* and not eliminated under the new rules, and the language in the new term 'permitted use' * * * does not effect a substantive change from the previous regulation." Appellant's Br. at 20 (emphasis in original). The Secretary does not acknowledge that the new regulations end recognition of the adjudicated grazing preference. Rather, the Secretary asserts that the new permitted use "encompasses all of the essential elements of the prior term [i.e., grazing preference]." *Id.*

The pre-1995 "grazing preference" was defined as the "total number of [AUMs] of livestock grazing on public lands apportioned and attached to base property owned or controlled by a permittee or lessee." 43 C.F.R. § 4100.0-5 (1994). Under this regulation, the number of AUMs "apportioned and attached" to the permittee's base property was the number of AUMs allocated to the permittee (or her predecessor) by an individual grazing adjudication. See *McLean* v. *BLM*, 133 I.B.L.A. 225, 232-33 & n.12 (1995) (noting that while 1978 regulations drastically changed grazing preference system, new system continued to recognize individual adjudications made prior to 1978); see also 43 Fed. Reg. 29,058 (July 5, 1978) (addressing permittees' concerns about post-1978 regulatory scheme and stating that permittees' "adjudicated grazing use * * * will be recognized under these grazing regulations") (quoted in *McLean*, 133 I.B.L.A. at 233).

The "permitted use" introduced in the 1995 regulations is defined as "the forage allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease and * * * expressed in AUMs." 43 C.F.R. § 4100.0-5 (1995). Unlike the old "grazing preference," the "permitted use" no longer refers to the number of AUMs determined by individual grazing adjudications. The Secretary's own interpretation of the permitted use rule makes this clear.

> *Grazing preference* is redefined to mean the priority to have a Federal permit or lease for a public land grazing allotment that is attached to base property owned or controlled by a permittee * * *. *The definition omits reference to a specified quantity of forage, a practice that was adopted * * * during the adjudication of grazing privileges * * *.* BLM will identify the amount of grazing use (AUMs), consistent with land use plans, in grazing use authorizations to be issued under a * * * permit * * *.
>
> A definition of *Permitted use* is added to define the amount of forage in an allotment that is allocated for livestock grazing and authorized for use * * * under a grazing permit * * *. The term replaces the AUMs of forage use previously associated with grazing preference.

60 Fed. Reg. at 9921 (emphasis added); see also *id.* at 9922-23 ("The objectives set in the [land use] plan are refined in the permit * * *, and permitted use is then expressed in AUMs of active use * * *, as well as suspended use and temporary nonuse during a particular time period."). The majority never squarely addresses whether the new regulations end recognition of the original adjudications

because it concludes that the adjudications have not been recognized under any regulations since the enactment of FLPMA in 1977. See Maj. Op. at 1298. I refer to my above discussion in section I.B of this dissent to make the point that the adjudications were indeed recognized until the 1995 regulations.

Under the permitted use rule, the maximum amount of forage that a permittee can graze is established solely by a land use plan adopted by the BLM, with no reference to the results of the grazing adjudications. By contrast with the old system, the new permitted use approach ends recognition of the grazing preference across the board, for *all* permittees, without reference either to their individual circumstances or to the condition of the land covered by their permits. Under the new regulations, a permittee's grazing privileges consist of the right to use the AUMs specified in the grazing permit for a ten-year term and a bald right to preference at renewal time. Gone is recognition of the underlying adjudication in which the Secretary made a determination that, vis-a-vis other applicants, the permittee was a member of a priority group entitled to graze up to a maximum amount of forage on a particular allotment, and to which the Secretary previously always referred in renewing grazing permits.

There is no guarantee that the permittee will be allowed to graze predictable amounts of forage upon renewal, nor that the permittee's priority position is secure. I think this difference is significant, for it erases the certainty and predictability that existed under the pre-1995 regulatory scheme and that I am certain was required by Congress under the TGA. The result is that the agency has nearly unfettered discretion to collectively increase or decrease permittees' maximum allowed forage use without reference to the individual grazing decisions laboriously adjudicated by the Secretary following passage of the TGA.

D. Statutory Mandate

The dispositive question at issue regarding the new permitted use rule is whether the Secretary's elimination of adjudicated grazing preferences conflicts with Congress's mandate that "grazing privileges recognized and acknowledged shall be adequately safeguarded." To answer this question, *Chevron* requires us to ask whether that mandate is an unambiguous expression of Congressional policy, for if it is, the courts, "as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

In examining this language, we assume that the words chosen by Congress are employed in their ordinary sense and accurately express Congress's legislative purpose. See *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990). The words "grazing privileges" are straightforward. In the context of the TGA, a grazing privilege is the legislatively authorized right to use an allotment of the public lands for grazing livestock under terms set by the Secretary. See 43 U.S.C. § 315b. What then, is a "recognized and acknowledged" grazing privilege? In the context of the TGA, it seems to me, the answer to that question is also straightforward. With its delineations of groups that are to receive first priority in the distribution of permits, section three of the TGA envisions the Secretary's undertaking an adjudicatory process in order to fairly and orderly allocate grazing privileges on the public lands. See 43 U.S.C. § 315b ("Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights * * *.").

I would hold that the phrase "grazing privileges recognized and acknowledged" unambiguously refers to the grazing privileges that Congress charged the Secretary with allocating in section three of the TGA, including the adjudicated grazing levels. The Secretary allocated these privileges to qualified applicants through a detailed adjudication process that took many years to complete. Although Congress did not specify the exact system to be used beyond the initial preferences set forth in section three of the Act, it knew that such an adjudicatory process was necessary in order to identify those livestock operators who should be able to use the public range for grazing.

Similarly, I would conclude that use of the term "adequately safeguarded" is an unambiguous expression of Congress's intent that the Secretary protect the grazing privileges that are recognized and acknowledged by the adjudication process undertaken following passage of the TGA. To safeguard means to protect or defend. See WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1981). Even though the modifier "adequately" is necessarily ambiguous, and what constitutes an adequate safeguard rests with the discretion of Secretary, the Secretary cannot altogether abandon his obligation to safeguard recognized grazing privileges. I do not question the authority of the Secretary to revoke a grazing permit because of a permittee's failure to comply with the terms and conditions of the permit or the grazing regulations. See 43 U.S.C. § 1752(a). So long as grazing privileges are unrevoked, however, the Secretary may not interfere with their exercise. See, e.g., *Oman*, 179 F.2d at 742 (noting that Secretary has "affirmative obligation" to safeguard grazing privileges).

There are at least two well-settled aspects to the Secretary's obligation to safeguard grazing privileges. First, the Secretary "must observe statutory preferences and

priorities in granting and renewing permits." GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 19.02[1][c] (1997). Second, the Secretary must protect a permittee's allotment from trespasses by competing livestock operators. See *id.*; *Oman* v. *United States*, 179 F.2d 738, 739-742 (10th Cir. 1949) (allowing permittee with exclusive grazing privileges to bring Federal Tort Claims Act against government for failing to prevent other livestock operators from using land covered by permit and noting that Secretary had duty, under TGA, to safeguard plaintiff's grazing privileges against such trespass). The question before this Court today is whether the Secretary's duty to safeguard also includes an obligation to continue to recognize the adjudicated grazing levels, embodied in the pre-1995 regulations in the term "grazing preference." The majority does not answer this question because it concludes that even under the prior regulations, the historical grazing adjudications were not recognized. The majority is mistaken on this latter point, however. In failing to even address this question, the majority reveals a lack of understanding of the preference system that had been in place since 1934 and the regulatory scheme that implemented that system.

Congress requires the Secretary to safeguard permittees' recognized and acknowledged grazing privileges. In the permitted use rule, the Secretary has failed to safeguard the results of the grazing adjudications in which permittees' privileges were first recognized and acknowledged. The new permitted use rule, in effect, wipes the slate clean. That permittees will not immediately lose their right to graze on the public lands seems, to me, irrelevant. When the Secretary undertook to allocate privileges to various applicants to graze a particular allotment on of the public range, he made a series of determinations. He determined that the applicant either was or was not a member of a priority group. He determined whether the applicant had made historic use of

the range. He determined what level of forage the applicant had used and whether, vis-a-vis all other applicants, that applicant should be entitled to continue that level of use. Then, he awarded a successful applicant a grazing preference to graze up to a certain amount of forage, not just for the life of the permit, but for as long as the Secretary allowed the permittee to graze on the public lands. The majority's decision upholding the permitted use rule, in my judgment, reads out the central statutory mandate of section three of the Taylor Grazing Act.

I do not deny that the Secretary has full authority to control permittees' use of the range. See 43 U.S.C. § 315b ("[The Secretary] shall specify from time to time numbers of stock and seasons of use."). The Secretary, however, lacks the authority to eliminate recognition of the underlying adjudications upon which permittees' grazing privileges are based and upon which they rely in running their livestock operations. Because the Secretary exceeded his statutory authority under the Taylor Grazing Act by promulgating the new permitted use regulations, I would set aside the regulations that define permitted use without reference to the original grazing adjudications.

II. Title to Range Improvements

I also disagree with the majority's conclusion that section four of the TGA is ambiguous with respect to ownership of rangeland improvements constructed by a permittee on the public lands. The majority concludes that the TGA is ambiguous as to whether permittees who construct improvements should hold title to those improvements, and therefore the Secretary was within his authority promulgating new 43 C.F.R. § 4120.3-2(b) (1995). That new regulation states that title to *all* permanent range improvements authorized under cooperative agreements after August 21, 1995 shall be in the United States. A cooperative

agreement is an agreement between a permittee and the Secretary whereby both parties jointly pay for the construction of a rangeland improvement.

I agree with the PLC that the TGA grants permittees ownership rights in improvements constructed either in whole or in part by the permittee. The following language from section four of the TGA is relevant:

> **Fences, wells, reservoirs, and other improvements; construction; permits; partition fences.**
>
> Fences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands within such grazing districts under permit issued by the Secretary or under such cooperative arrangement as the Secretary may approve.* * * No permit shall be issued which shall entitle the permittee to the use of *such improvements constructed and owned* by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior.

43 U.S.C. § 315c (emphasis added). Under this provision, a permittee who "construct[s] and own[s]" an improvement on the public lands is entitled to compensation for its value from a subsequent permittee before the subsequent permittee may use the improvement. *Id.*; *cf.* 43 U.S.C. § 1752(g) (stating that a permittee is entitled to reasonable compensation from the government for his interest in authorized permanent improvements he has constructed if the government cancels his grazing permit). Thus, new 43 C.F.R. 4120.3-2(b), which gives the federal government title to improvements

built by a permittee, has significant consequences for permittees: since title to improvements is not in the hands of the permittees who construct them, permittees are not *statutorily* entitled to any compensation from later users.

The district court determined that section four of the Taylor Act "strongly suggests that the individual who constructed the improvement should own it" and, therefore, struck down the Secretary's range improvements rule as "exceed[ing] statutory authority." *Public Lands Council* v. *Babbitt*, 929 F. Supp. 1436, 1442-43 (D. Wyo. 1996). The majority disagrees with the district court, concluding that this statutory section gives the government unlimited discretion to determine *what* improvements, if any, may be both "constructed *and* owned" by a permittee.

I cannot agree with the assertion that Congress wanted the Secretary to decide whether a permittee should hold title to improvements paid for and constructed by the permittee. In my judgment, the statute is not ambiguous on this point. It is a well-accepted principle that the first step in interpreting a statute is to determine whether the relevant language has a plain meaning with respect to the particular dispute in the case. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337 (1997). The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. See *id.* The phrase "such improvements constructed and owned by a prior occupant" plainly indicates to me that when a permittee constructs an authorized improvement, he or she holds title to that improvement. In my judgment, the previous version of section 4120.3-2, which shared title between the United States and permittee "in proportion to the actual amount of the respective contribution to the initial construction," was an accurate and appropriate articulation of an unambiguous

statutory mandate. 43 C.F.R. § 4120.3-2 (1994). Permittees acquired title for that portion of any improvement that they were responsible for constructing.

The provision for compensation in section four of the statute supports my reading. The majority's reading of the statute, together with the Secretary's new regulation, renders that compensation provision meaningless; without title, a permittee is not be entitled to the compensation for which the statute provides. It is true, as the majority points out, that other regulations still guarantee permittees full compensation for their investments in improvements, even when they do not own those improvements. See 43 C.F.R. §§ 4120.3-5, 4120.3-6(c) (1995). The existence of such regulations does not change the analysis, however. It cannot be doubted that section four of the TGA only *guarantees* compensation if the permittee *owns* the improvement. Under the Secretary's approach-where the permittee does not own improvements-compensation to the permittee is a discretionary decision by the Secretary; so long as he wishes, by regulation, to compensate permittees, he may do so. Under this approach, however, there would also be no violation of law if the Secretary were later to end the regulatory entitlement to compensation. The majority's equating a statutory entitlement to a discretionary entitlement embodied in a regulation reveals a misunderstanding of administrative law.

My conclusion that the statutory language is unambiguous on who holds title to improvements constructed on the public lands also reveals a great divide between the majority and me on the role that courts have in interpreting statutory language. We ought not examine statutory language so as to needlessly create ambiguities where no such ambiguity exists. Rather, in interpreting a statute, we should begin with a strong presumption that Congress expressed its will on the issue at hand. I disagree with the majority that

one must add the word "therefore" to the phrase "constructed and owned" to reach the conclusion that I do. Clearly, one may deconstruct the statutory language as the majority does and insert an ambiguity into it. My common understanding of the statutory language, however, leads me to conclude that Congress thought about the question before us, and unambiguously spoke to it.

Nor do I agree with the majority that "nothing in the statutory language directs where such title must lie." Maj. Op. at 1302. That Congress specifically discusses ownership of improvements demonstrates to me that it thoroughly considered that question. The TGA is a statute replete with discretionary language and congressional grants of rulemaking authority. Such discretionary language or rulemaking authority is conspicuously absent on the question of who should hold title to range improvements. That is for good reason. Congress considered the question and spoke precisely to the issue. As I understand the role of the courts, I do not think *Chevron* gives us license to ignore the plain meaning Congress employed.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 96-8083

PUBLIC LANDS COUNCIL, *et al.*, Plaintiffs-Appellees,

v.

BRUCE BABBITT, UNITED STATES DEPARTMENT OF INTERIOR SECRETARY, *et al.*, Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING
(D. Ct. No. 95-CV-165-B)

Before SEYMOUR, Chief Judge, PORFILIO, and TACHA, Circuit Judges

---

ORDER ON REHEARING
Filed February 8, 1999

The Secretary has petitioned the court for rehearing, requesting that it delete the highlighted portion of the following sentence as unnecessary to the court's holding and incorrect as a matter of law: "Congress intended that once the Secretary established a grazing district under the TGA, the primary use of that land should be grazing *unless the*

Secretary withdraws the land from grazing use in accordance with the withdrawal provisions of FLPMA. See 43 U.S.C. § 1714". Slip op. at 56. In response, Public Lands Council concedes that the statutory citation is incorrect but contends that we should cite a different statutory provision rather than remove the highlighted portion of the sentence.

Upon consideration, the court grants the limited petition for rehearing and orders the highlighted portion of the sentence removed from the court's opinion so that the sentence will read: "Congress intended that once the Secretary established a grazing district under the TGA, the primary use of that land should should be grazing." An amended copy of the court's opinion is attached to this order.

Entered for the Court

PATRICK FISHER, Clerk of Court

by: /s/ Amy Frazier
Deputy Clerk

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 96-8083

PUBLIC LANDS COUNCIL, *et al.*, Plaintiffs-Appellees,

v.

BRUCE BABBITT, UNITED STATES DEPARTMENT OF INTERIOR SECRETARY, *et al.*, Defendants-Appellants.

ORDER
Filed January 28, 1999

Before SEYMOUR, Chief Judge, PORFILIO, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, HENRY, and MURPHY, Circuit Judges.

Public Lands Council's petition for rehearing is denied.

A poll was taken on the en banc suggestion. The suggestion was denied by an evenly divided court with Judges Tacha, Baldock, Brorby, Ebel, and Kelly voting to grant rehearing en banc. Judges Briscoe and Lucero recused and did not participate in this matter.

The petition for rehearing filed on behalf of the Secretary of the Interior remains pending.

Entered for the Court

PATRICK FISHER, Clerk of Court

by: /s/ Amy Frazier
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WYOMING

No. 95-CV-165-B

PUBLIC LANDS COUNCIL, *et al.*, Petitioners,

v.

BRUCE BABBITT, UNITED STATES DEPARTMENT OF INTERIOR SECRETARY, *et al.*, Respondents.

ORDER ON PETITION FOR REVIEW

June 12, 1996

BRIMMER, District Judge.

In February, 1995, the Secretary of the Interior, Bruce Babbitt, promulgated new regulations governing the administration of livestock grazing on public lands managed by the Bureau of Land Management ("1995 regulations"). The regulations became effective on August 21, 1995.

The petitioners challenge these new regulations, claiming that portions of the regulations violate the Taylor Grazing Act, the Federal Land Policy Management Act, the Public Rangelands Improvement Act, the National Environmental Policy Act, and the Administrative Procedure Act (APA).

The petitioners also claim that the regulations deny them due process and subject them to double jeopardy, and otherwise lack a rational basis. The petitioners ask the Court to declare several of the 1995 regulations unlawful and enjoin their implementation.

Standard of Review

A district court sits as an appellate court when reviewing agency action. *Olenhouse* v. *Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1995). Under the APA, this Court must uphold agency action unless it is arbitrary and capricious, exceeds statutory authority, or violates the Constitution. 5 U.S.C. § 706(2); see also *Mountain Side Mobile Estates* v. *Secretary of HUD*, 56 F.3d 1243, 1250 (10th Cir. 1995).

Agency action is arbitrary and capricious if there is no rational basis for the action or if the agency fails to consider important relevant factors. *Woods Petroleum Corp.* v. *Department of Interior*, 47 F.3d 1032, 1037 (10th Cir. 1995). Public Lands Council bears the burden of proving that the Department of Interior acted arbitrarily and capriciously, exceeded its statutory authority, or violated the Constitution.

Analysis

I. Elimination of the Grazing Preference

The 1995 regulations replace the term "grazing preference" with the term "permitted use." Public Lands Council argues that this eliminates the grazing preference and thus violates the Taylor Grazing Act. The government disagrees and argues that the change in terminology is a change in form, not substance, and the new rules do not eliminate or interfere with anything in the Taylor Grazing Act.

Congress enacted the Taylor Grazing Act in 1934. Pursuant to the Act, the Secretary identified public lands "chiefly valuable for grazing and raising forage crops" and placed these lands in grazing districts. 43 U.S.C. § 315. After designating these districts, the Secretary began issuing permits pursuant to the Taylor Grazing Act, which provides:

> The Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range * * *. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights.

43 U.S.C. § 315b.

Thus, the Department of Interior engaged in a lengthy adjudication process to determine who was eligible for a grazing preference. This process began in the 1930's and took nearly 20 years to complete. Applicants were divided into five classifications with different priorities assigned to each class of applicants. The Department of Interior reviewed applications and recommendations of local boards, and issued adjudication decisions awarding grazing preferences to qualified applicants. The term "grazing preference" thus came to represent an adjudicated right to place livestock on public lands. This right was measured in Animal Unit Months (AUMs), the amount of forage necessary to sustain one animal for one month.

The grazing preference attached to the base property, and followed the base property if it was transferred. The

adjudication process provided predictability and security to livestock operators who remained in one area. This system comported with congressional intent, which was to provide stock operators with "some type of assurance as to where and what kind of range they may have and depend upon for their stock, what they can definitely rely upon in the way of pasturage." 78 Congressional Record at 5371.

Once the Department of Interior granted a grazing preference, the Taylor Grazing Act required that "grazing privileges recognized and acknowledged shall be adequately safeguarded." 43 U.S.C. § 315b. This language imposes on the Secretary an affirmative duty to protect grazing privileges. *Oman* v. *United States*, 179 F.2d 738, 742 (10th Cir. 1949).

Despite this safeguarding requirement-which protects long-established grazing preferences-the 1995 regulations eliminate the adjudicated grazing preferences. They do so by using the term "permitted use" which is defined as "the forage allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease and is expressed in AUMs." 43 C.F.R. § 4100.0-5 (1995). The term "permitted use" has no connection to the painstakingly adjudicated "grazing preferences." Under the 1995 regulations, a permittee no longer has an adjudicated right to graze a predictable number of livestock on public lands.

A "permitted use" does not enjoy the same protection that an adjudicated "grazing preference" received. A "grazing preference" could not be canceled, suspended, or reduced without an evidentiary hearing that afforded due process to the permittee. 43 U.S.C. § 315h; *Oman*, 179 F.2d at 742. The Secretary's substitution of a right of renewal provides less protection and violates the Taylor

Grazing Act because it fails to adequately safeguard the recognized grazing preferences.

The change also reduces predictability and certainty. Bank loans are often based on carrying capacity. A permittee without a definite and certain grazing preference may be unable to obtain necessary financing and be forced out of the livestock industry. See 78 Cong. Rec. at 5371.

Although the Taylor Grazing Act gives the Secretary the power to do "any and all things necessary" to protect the rangeland, 43 U.S.C. § 315a, this general grant of authority is not so broad that it allows the Secretary to violate the Act's specific mandate to adequately safeguard grazing preferences.

The Secretary's expressed desire to make grazing regulations similar to Forest Service rules is not a reasoned explanation. The Taylor Grazing Act does not apply to national forests, and the Forest Service did not engage in a lengthy adjudication process to establish grazing preferences.

Additionally, grazing permits issued by the Forest Service enjoy much less protection than a Taylor Grazing Act grazing preference. The Forest Service has broad discretion to deny or refuse to renew permits and is not required to provide a permittee or applicant with notice and a hearing. In contrast, the Taylor Grazing Act requires the Secretary to safeguard grazing preferences and provides for notice and a hearing.

With a mere stroke of his pen, the Secretary has boldly and blithely wrested away from Western ranchers the very certainty, the definitiveness of range rights, and the necessary security of preference rights that their livestock operations require. Congress gave Western ranchers these rights by enacting the Taylor Grazing Act, and many decades

of satisfactory operations and the course of case by case adjudications have confirmed these rights. The Court cannot ignore the Secretary's disregard of his congressionally imposed duty; it must be stopped before it wreaks havoc with the ranching industry that Congress has tried to preserve.

For these reasons, the Court holds that the 1995 regulations violate the Taylor Grazing Act by failing to adequately safeguard adjudicated grazing preferences and that the 1995 regulations lack a reasoned basis. The Court therefore concludes that the Secretary exceeded his statutory authority by enacting this regulation.

II. Affiliate Regulations

Before a permittee can renew his grazing permit, the Department of Interior must determine that the applicant, and any affiliate(s) of the applicant, have substantially complied with the terms and conditions of the original permit. 43 C.F.R. § 4110.1-1(b)(1) (1995). An applicant seeking a new permit will not receive it if the applicant or any affiliate of the applicant has had a grazing permit or lease canceled in the preceding 36 months for violating that permit's terms and conditions. *Id.* at (b)(2). The 1995 regulations define an affiliate as:

> [A]n entity or person that controls, is controlled by, or is under common control with, an applicant, permittee, or lessee. The term "control" means having any relationship which gives an entity or person authority directly or indirectly to determine the manner in which an applicant, permittee or lessee conducts grazing operations.

43 C.F.R. § 4100.0-5 (1995).

The Secretary's definition of "affiliate" is extremely broad, but no more so than the definition of "affiliate" in

other federal statutes. See, e.g., 11 U.S.C. § 101(2) (bankruptcy code definition); 36 C.F.R. § 223.133 (1995) (Forest Service definition). More importantly, the Taylor Grazing Act gives the Secretary broad authority to do "any and all things necessary" to preserve the public lands and "to provide for the orderly use, improvement, and development of the range." 43 U.S.C. § 315a. The Taylor Grazing Act also gives the Secretary authority to determine "which individuals under his rules and regulations are entitled to participate in the use of the range." 43 U.S.C. § 315b.

The new "affiliate" provision certainly falls within the broad scope of power the Taylor Grazing Act confers on the Secretary. The Secretary is charged with preserving the public lands and ensuring that those who use the public lands have complied with the terms and conditions of earlier permits. It follows, then, that the Secretary should consider the stewardship records of permit holders and their affiliates. It would be illogical to consider a permittee in compliance with the permit's terms and conditions when the permittee's agents or employees violate these very terms and conditions when carrying out the permittee's business.

Given this fact, and the Secretary's broad powers under the Taylor Grazing Act, the Court finds that these regulations are rational and do not exceed the Secretary's broad rulemaking power.

III. Title to Range Improvements

Before 1995, the Department of Interior encouraged private investment in public lands by allowing private individuals, through cooperative agreements with the Department of Interior, to build and install structural range improvements (like fences, wells, stock tanks, and pipelines) on public lands. Title to such improvements was "shared by the United States and the cooperator(s) in proportion to the

actual amount of respective contribution to the initial construction." 43 C.F.R. § 4120.3-2 (1994). In fact, the Department of Interior often required permittees to build such improvements as a condition for issuing a grazing permit.

The 1995 regulations alter this practice and provide that the United States asserts title to all structural range improvements authorized after August 21, 1995. 43 C.F.R. § 4120.3-2(b) (1995). The purpose of this change is to "return to common law concepts regarding retention of permanent improvements in the name of the party that holds title to the land." 60 Fed. Reg. 9897. Public Lands Council argues that this change contradicts the Taylor Grazing Act and further claims that the Department of Interior failed to provide a reasoned explanation for making the change. The Court agrees with this argument and holds that the regulation exceeds statutory authority and lacks a reasoned basis.

The Taylor Grazing Act allows permittees to construct range improvements on public lands. 43 U.S.C. § 315c. If a permittee receives a grazing permit to use land where a prior occupant has constructed a range improvement, the new permittee cannot use the improvement unless he compensates the prior occupant for the reasonable value of the improvement. *Id.* This compensation provision strongly suggests that the individual who constructed the improvement should own it. The 1934 Senate Committee Hearings support this conclusion. See 1934 Senate Committee Hearings at 77-80.

Additionally, the Federal Land Policy Management Act also indicates that this was Congress' intent. The Federal Land Policy Management Act provides that if the Secretary cancels a grazing permit or lease to devote the land to another public purpose, the United States must compensate the permittee or lessee for the value of his interest in any

range improvements. 43 U.S.C. § 1752(g). Such compensation would not be necessary if the permittee did not own the range improvement.

The Department of Interior's expressed desire to return to common law precepts about ownership is not a reasonable one. The Taylor Grazing Act and the Federal Land Policy Management Act clearly indicate that Congress intended to grant title to range improvements to those who constructed them. A federal statute preempts the common law.

Even if the common law applied, however, the Department of Interior's explanation would not be reasonable. Range improvements would not be considered fixtures because the range improvements usually could be severed from the land without adversely affecting the land, except for reservoirs and similar improvements. Therefore the permittee or lessee would still hold title to the improvements.

The Department of Interior also claims that the new regulation is necessary to facilitate the multiple use of public lands in accordance with the Federal Land Policy Management Act. However, the old regulations required that all range improvements had to be "consistent with multiple use management." 43 C.F.R. § 4120.3-1(a) (1994). The new regulation does not facilitate multiple use management; such management was already the rule.

For these reasons, the Court holds that the 1995 regulation regarding title to range improvements contradicts the Taylor Grazing Act and discourages private investment in public lands and rangeland improvements. The Secretary seeks to confiscate the improvements the ranching industry makes to increase the carrying capacity of the range. This regulation exceeds statutory authority and lacks a reasoned basis.

IV. Conservation Use Permits

The 1995 regulations alter the definition of "active use" to include "conservation use" as an active use. 43 C.F.R. § 4100.0-5 (1995). Conservation use is an activity, excluding livestock grazing, designed to protect public land, improve rangeland conditions, or enhance resource values. *Id.* A permittee may engage in conservation use for a defined period up to 10 years. A permittee who receives a permit for conservation use thus receives a grazing permit to not graze livestock. Public Lands Council argues that this new "active" use exceeds statutory authority and contradicts congressional intent. The Court agrees.

The Taylor Grazing Act is, as its name indicates, a grazing act. Pursuant to the Taylor Grazing Act's mandate the Secretary identified public lands best suited for grazing and placed these lands in grazing districts. The Taylor Grazing Act authorizes the Secretary to issue permits to graze these lands, but it does not authorize the Secretary to issue permits allowing permittees to remove public lands from grazing for ten-year periods. Congress enacted the Taylor Grazing Act to provide certainty and predictability in the livestock industry; issuing permits that exclude livestock grazing from public lands frustrates this goal. Such permits also circumvent the decision Congress made when enacting the Taylor Grazing Act that certain lands were best suited for grazing.

Conservation use permits also violate the Federal Land Policy Management Act. The Federal Land Policy Management Act defines livestock grazing as a "principal or major use." 43 U.S.C. § 1702(1). The Department of Interior must use the Federal Land Policy Management Act's land use planning process before it excludes a major use like livestock grazing from public lands. 43 U.S.C. § 1712. The Department of Interior must amend Bureau of Land

Management land use plans before withdrawing public lands from livestock grazing, and it must also notify appropriate congressional committees if more than 100,000 acres are involved. *Id.* The Federal Land Policy Management Act requires the Department of Interior to provide the public with notice of its intent to close public lands to livestock grazing and give the public an opportunity to comment on the plan. 43 U.S.C. § 1739.

The Taylor Grazing Act does not permit the Secretary to issue permits allowing the permittee to put the land to any use except livestock grazing. Such permits contradict the very purpose of the Taylor Grazing Act; therefore, the Secretary exceeded his statutory authority by enacting this provision of the 1995 regulations.

V. Limits on Temporary Non-Use

The 1995 regulations allow the Bureau of Land Management to authorize temporary non-use of a grazing permit. 43 C.F.R. § 4130.2(g). Reasons justifying temporary non-use of a grazing permit include financial hardship and annual livestock fluctuation. The regulation limits temporary non-use to three consecutive years. *Id.* at (g)(2). Earlier regulations also allowed temporary non-use, but did not impose a time limitation. Public Lands Council argues that the three-year limit lacks a rational basis and forces permittees to use their permit or lose it, even if temporary non-use would benefit the land.

The record reveals that the Department of Interior had a rational basis for implementing this regulation. A 1986 study by the Interior Department Inspector General determined that a significant number of permittees abused the temporary non-use option by placing their allotted AUMs in temporary non-use for periods of four to five years (or even longer, in some cases) without providing an acceptable

reason for doing so. As a result, available AUMs went unused and cost the Bureau of Land Management potential revenue. The Inspector General's "conservative estimate" of this lost revenue was $1,000,000 for the 1984 grazing season.

The Inspector General criticized the Bureau of Land Management's supervision of the temporary non-use option and recommended that the Bureau of Land Management police temporary non-use more closely. After reviewing the Inspector General's study and criticism, the Bureau of Land Management imposed a three-year limit on temporary non-use.

Public Lands Council claims that the three-year limit does not account for the possibility that prolonged, severe weather conditions might require temporary non-use that exceeds three years. Although the Court agrees that this limit might be bad judgment, it cannot say that the Secretary's judgment was arbitrary and capricious. The Court cannot set the three-year limit aside.

VI. Reduction of Mandatory Qualifications

Before 1995, applicants had to "be engaged in the livestock business" and own or control land or water base property to qualify for a grazing permit. 43 C.F.R. § 4110.1 (1994). The regulations also required that an applicant be either: (1) a U.S. citizen (or have filed a declaration of intent to become a U.S. citizen); or (2) a group or association authorized to do business in the state in which the grazing permit was sought. All members of the group or association had to be U.S. citizens or have declared their intent to become U.S. citizens; or (3) a corporation authorized to do business in the state in which the grazing permit was sought. *Id.*

The 1995 regulations retain all of these requirements except for one-the applicant need not be engaged in the livestock business. Instead, the applicant need only own or control base property that is capable of being used in the livestock business. 43 C.F.R. §§ 4110.1, 4110.2-1(a)(1) (1995). Public Lands Council claims that this change violates the Taylor Grazing Act and lacks a reasoned basis.

The Taylor Grazing Act provides that "[p]reference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights." 43 U.S.C. § 315b. Congress intended for the Taylor Grazing Act to benefit people actually engaged in the livestock business. 1934 Senate Committee Hearings at 74. From the beginning the Department of Interior consistently granted grazing permits and leases only to applicants engaged in the livestock business. See, e.g., *Winchester Land and Cattle Co.*, 65 Interior Dec. 148 (1958); *Orin L. Patterson, et al.*, 56 Interior Dec. 380 (1938) (denying application for grazing lease because applicant was not engaged in the livestock business).

Allowing individuals who own or control land suitable for livestock use, but who do not actually raise livestock, to obtain grazing permits frustrates congressional intent. These individuals should not be able to obtain grazing permits they cannot use and thereby preclude livestock operators from grazing their livestock on public lands.

The Department of Interior claims that this change is necessary because it allows non-traditional applicants like banks and conservation organizations to obtain grazing permits. However, such applicants were already able to obtain grazing permits. See, e.g., *Forgey Ranch Co.* v. *Bureau of Land Management*, 116 IBLA 32 (1990) (allowing bank to keep permit because it was engaged in the livestock

business); *Defenders of Wildlife*, 19 IBLA 219 (1975) (conservation organization engaged in livestock business entitled to grazing permit). The reasons proffered by the Department of Interior in support of the change thus lack a reasoned basis.

The reduction in mandatory qualifications violates the Taylor Grazing Act and frustrates its purposes. The Department of Interior also has failed to provide a rational explanation for the change. Thus, the Court sets this provision in the 1995 regulations aside.

VII. Exclusive Use of Water Diversions

The 1995 regulations provide that "[r]ange improvement work performed by a cooperator or permittee on the public lands or lands administered by Bureau of Land Management does not confer the exclusive right to use the improvement or the land affected by the range improvement work." 43 C.F.R. § 4120.3-2(d) (1995). Public Lands Council claims that prior regulations gave permittees the exclusive use of water-related range improvements like stock ponds and wells. Public Lands Council argues that the Department of Interior has reversed its earlier practice without a reasoned explanation.

A review of earlier regulations, however, reveals that permittees never had an exclusive right to use water-related range improvements. The prior regulation provided that "[t]he use by livestock of stock ponds or wells authorized by a range improvement permit shall be controlled by the grazing permittee or lessee holding the range improvement permit." 43 C.F.R. § 4120.3-3(c) (1994). Though not artfully worded, the plain language requires permittees to control their livestock's use of water-related range improvements; it does not grant permittees the right to control the improvement itself.

Further, the Department of Interior has never recognized exclusive use of water-related improvements as a form of range management. A permittee must obtain a permit or cooperative range improvement agreement before installing water-related range improvements on public lands. 43 C.F.R. § 4120.3-1(b) (1994). Such improvements must be compatible with multiple-use purposes, including wildlife habitats. *Id.* at § 4120.3-1(a). The Department of Interior thus required that water-related range improvements serve wildlife and other uses as a condition of obtaining a range improvement permit. This is inconsistent with Public Lands Council's claim that permittees had exclusive control over water-related range improvements.

The 1995 regulations did not alter the Department of Interior's earlier practice without a reasoned explanation. Rather, they clarified existing practice. The Court cannot set this provision aside.

VIII. Constitutional Claims

Public Lands Council claims that two of the 1995 regulations violate the Constitution. Public Lands Council asserts that 43 C.F.R. § 4140.1(c) (1995), which provides for suspension or cancellation of a grazing permit, violates the Double Jeopardy clause of the Fifth Amendment. Public Lands Council also asserts that 43 C.F.R. § 4130.8-1(d) (1995), which imposes a surcharge on certain pasturing agreements, violates the Due Process clause.

Because Public Lands Council challenges the facial validity of these regulations, it "must establish that no set of circumstances exist under which the [regulations] would be valid." *Reno* v. *Flores*, 507 U.S. 292, 301 (1992) (quoting *United States* v. *Salerno*, 481 U.S. 739, 745 (1987)). "The fact that the [regulations] might operate unconstitutionally under some conceivable set of circumstances is insufficient

to render [them] wholly invalid." *Rust* v. *Sullivan*, 500 U.S. 173, 183 (quoting *Salerno*, 481 U.S. at 745).

A. Double Jeopardy

The 1995 regulations allow Bureau of Land Management officials to suspend or cancel a grazing permit or lease if the permittee or lessee is convicted of violating certain environmental laws. 43 C.F.R. § 4140.1(c) (1995).[1] Public Lands Council claims that this constitutes a second punishment for the same offense, and therefore violates the Double Jeopardy clause.

Among other things, the Fifth Amendment to the U.S. Constitution provides that a person may not "be twice put in jeopardy of life or limb" for the same offense. U.S. Const. amend. V. However, this clause does not prohibit different sovereigns from pursuing successive prosecutions based on the same conduct. *Abbate* v. *United States*, 359 U.S. 187, 194-96 (1959). A state could prosecute an individual for violating its environmental laws and the Bureau of Land Management could suspend or cancel that individual's grazing permit for the same conduct without violating the Double Jeopardy clause. Thus, the regulation could operate under at least one set of conceivable circumstances without violating the Constitution, so Public Lands Council's facial challenge to the regulation must fail. See *Rust*, 500 U.S. at 183.

---

[1] This regulation actually outlines various federal and state environmental laws and provides that if a permittee violates one of these laws, he may be subject to civil penalties described in 43 C.F.R. § 4170.1-1 (1995). Section 4170.1-1, 43 C.F.R., gives BLM officials the authority to cancel or suspend grazing permits.

Moreover, a civil sanction imposed after a criminal conviction does not necessarily violate the Double Jeopardy clause. If the civil sanction is remedial in nature and is rationally related to a legitimate governmental objective, it does not violate the Double Jeopardy clause. *United States* v. *Halper*, 490 U.S. 435, 449 (1990). Here, the regulation bears a rational relationship to the Department of Interior's legitimate goal of encouraging permittees to act responsibly and obey federal and state environmental laws. The sanction is not punitive and does not violate the Double Jeopardy clause.

B. Due Process

The 1995 regulations impose a surcharge on a permittee if he allows livestock not owned by him or his children to graze on public lands. 43 C.F.R. § 4130.8-1(d) (1995).[2] This surcharge recovers a portion of the profit realized from "pasturing agreements," where permittees pay a low rate to use public lands and market this right to others for a much greater amount. Public Lands Council claims that this regulation is overinclusive because it impacts a number of transactions that do not produce a profit and therefore violates the equal protection component of the Fifth Amendment's due process clause.[3]

---

[2] The surcharge equals "35 percent of the difference between the current year's Federal grazing fee and the prior year's private grazing land lease rate per AUM." 43 C.F.R. § 4130.8-1(d) (1995).

[3] Although the Fifth Amendment does not contain an equal protection clause, it prohibits discrimination that violates due process. *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964).

An administrative classification that does not impact a fundamental right must be upheld if it is rationally related to a legitimate government goal. *Dandridge* v. *Williams*, 397 U.S. 471, 484; *Artez* v. *Mulcrone*, 673 F.2d 1169, 1171 (10th Cir. 1982). This is true even if the classification "is to some extent underinclusive and overinclusive." *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 593 n.39 (1979).

The surcharge regulation clearly has a rational basis. Reports issued by the General Accounting Office and the Interior Department Inspector General revealed that a significant number of permittees had profited from pasturing agreements and that the Bureau of Land Management failed to recover any portion of this profit. The reports determined that the Bureau of Land Management could reduce its operating deficit if it recovered a portion of these windfall profits.

Public Lands Council claims that the Department of Interior failed to respond to public comments criticizing the surcharge provision. However, the record indicates that the Department of Interior initially proposed a surcharge regulation that was much broader than the one it finally enacted. The Department of Interior received a number of critical comments and revised the surcharge regulation, narrowing it considerably. The Department of Interior adequately addressed public comments on this issue.

The surcharge regulation is rationally related to a legitimate government interest. The regulation does not violate the Fifth Amendment's Due Process clause.

IX. Fundamentals of Rangeland Health

The 1995 regulations adopt a set of management standards called the Fundamentals of Rangeland Health (Fundamentals). 43 C.F.R. § 4180.1 (1995). The Fundamentals allow the Bureau of Land Management to modify grazing practices to ensure that: (1) watersheds function properly or are making significant progress toward proper function; (2) ecological processes, including hydrologic cycles, nutrient cycles, and energy flow are maintained to support healthy biotic communities; (3) water quality complies with state standards and meets wildlife needs; and (4) certain endangered species habitats are maintained or restored. *Id.* The 1995 regulations also provide that the Bureau of Land Management will adopt state or regional standards and guidelines (Standards and Guidelines) to address these same concerns. 43 C.F.R. § 4180.2 (1995).

If the Bureau of Land Management determines that grazing practices need to be modified, it "shall take appropriate action * * * as soon as practicable but not later than the start of the next grazing year." 43 C.F.R. § 4180.1 (1995). Available actions include reducing livestock grazing, adjusting the grazing season, installing or moving range improvements, or developing alternative water sources. Public Lands Council concedes that the Bureau of Land Management has the authority to adopt the Fundamentals, but argues that the Bureau of Land Management failed to respond adequately to comments criticizing the Fundamentals and the Standards and Guidelines.

The Bureau of Land Management gave the public notice of the proposed rule and the opportunity to comment on it. In response, the Bureau of Land Management received a wide range of comments, both positive and negative, regarding the Fundamentals. The Bureau of Land Management responded to these comments in the Final

Environmental Impact Statement. The Final Environmental Impact Statement contains ten pages acknowledging and responding to criticism of the Fundamentals and the Standards and Guidelines. The Bureau of Land Management defended its methodology and explained why it made various choices.

The Court thus cannot say that the Bureau of Land Management failed to respond to critical comments. The adoption of the Fundamentals simply was not arbitrary and capricious.

X. The Final Environmental Impact Statement

The National Environmental Policy Act (NEPA) requires federal agencies to prepare an environmental impact statement that analyzes the effect major federal actions have on the quality of the human environment. 42 U.S.C. § 4332(2)(C). Pursuant to this section, the Bureau of Land Management prepared a draft environmental impact statement (DEIS) and circulated this draft for public comment. After considering public response to the DEIS, the Bureau of Land Management revised it and issued a Final Environmental Impact Statement (FEIS).

Public Lands Council challenges the adequacy of the FEIS. Public Lands Council claims that the FEIS violates NEPA's requirements because it fails to: (1) address areas of scientific controversy; (2) address material public comments; (3) consider environmental effects of the 1995 regulations.

In the Tenth Circuit,

> Judicial review of an EIS is limited to a consideration of the following: (1) does the EIS discuss all of the five procedural requirements listed in 42 U.S.C. § 4322(C); (2) does the EIS

> constitute a good faith compliance with the demands of NEPA; and (3) does the statement contain a reasonable discussion of the subject matter involved in the five respective areas?

Johnston v. *Davis*, 698 F.2d 1088, 1091 (1983) (quoting *Save Our Invaluable Land (SOIL), Inc.* v. *Needham*, 542 F.2d 539 (10th Cir. 1976)). The five specific issues that must be addressed are:

> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

42 U.S.C. § 4332(2)(C); *Holy Cross Wilderness Fund* v. *Madigan*, 960 F.2d 1515, 1521 (10th Cir. 1992). NEPA does not require the agency to reach a particular result, "it simply prescribes the necessary process." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

A. Scientific Controversy

The Court need not decide "whether the [FEIS] is based on the best scientific methodology available, or resolve disagreement among experts." *Seattle Audubon Society* v. *Moseley*, 798 F. Supp. 1473, 1479 (W.D. Wash. 1992). The Court need only ensure that the agency identified areas of

scientific controversy and "respond[ed] to adverse opinions held by respected scientists." *Id.* at 1482.

Public Lands Council claims that the Bureau of Land Management failed to acknowledge, much less discuss, scientific controversy regarding: (1) current range conditions; (2) livestock grazing's effect on biological diversity; (3) livestock grazing's effect on wildlife and big game habitat and endangered species; and (4) whether the Fundamentals will help improve rangeland resources.

1. Current Range Conditions

The Bureau of Land Management acknowledged that "[m]uch controversy surrounds the interpretation of the true condition of the public rangelands." FEIS at 4. The Bureau of Land Management recognized that a number of commentators disagreed with its conclusion that current range conditions needed improvement. The Bureau of Land Management also considered the effect other factors, such as fire, climate, and wildlife, had on the range. After considering all of these factors, the Bureau of Land Management concluded that new grazing regulations were necessary.

The Bureau of Land Management provided scientific and technical research to support its conclusions. Thus, the Court cannot say that the Bureau of Land Management violated NEPA in reaching its conclusions.

2. Biological Diversity

The Bureau of Land Management received a number of comments that criticized its conclusions about biological diversity. Public Lands Council concedes that the Bureau of Land Management responded to some of this criticism, but argues that the Bureau of Land Management did not

acknowledge scientific controversy about the role livestock grazing plays in biological diversity. The Court cannot agree.

The Bureau of Land Management recognized that livestock grazing impacts biological diversity and that proper livestock management can facilitate biological diversity. Public Lands Council criticizes the Bureau of Land Management's conclusion that a large disclimax[4] can harm biological diversity. However, the Bureau of Land Management responded to this criticism and defended its conclusion. Thus, the Bureau of Land Management acknowledged and responded to scientific disagreement on this issue.

3. Wildlife and Big Game Habitat

In the DEIS and FEIS, the Bureau of Land Management concludes that livestock grazing harms wildlife and big game habitat and has caused 75 different species to be listed as either threatened or endangered. The Bureau of Land Management received a number of comments that criticized these conclusions and responded to these comments.

The Bureau of Land Management recognized that big game populations remained stable but noted that wildlife species associated with grassland and riparian areas have declined. The Bureau of Land Management also admitted that livestock grazing may actually help some wildlife species and that livestock water diversions were not solely responsible for the decline of several species of fish. However, it did not change its conclusion that livestock grazing played a

---

[4] A "disclimax community" is defined as a "relatively stable ecological community that has displaced [the highest ecological development of a plant community] as a result of repeated or continuous disturbance by humans, domesticated animals, or natural events." DEIS at GL-7.

significant role in the decline of these fish. The Bureau of Land Management complied with NEPA because it acknowledged controversy and responded to it.

4. Fundamentals Impact on Rangeland Resources

As discussed in Section IX above, the Bureau of Land Management received a wide range of comment about the Fundamentals. The Bureau of Land Management adequately responded to these comments in the FEIS by acknowledging and responding to criticism of the Fundamentals as well as the Standards and Guidelines. The Bureau of Land Management defended its methodology and explained why it made various choices. The Bureau of Land Management did not violate NEPA.

B. Response to Public Comments

Public Lands Council criticizes the way the Bureau of Land Management handled public comments on the DEIS, arguing that the Bureau of Land Management failed to distinguish between comments made by scientists and comments made by the general public. The Court finds that the Bureau of Land Management was not required to make such a distinction.

The Bureau of Land Management received a great many comments regarding the DEIS. The Bureau of Land Management received more than 20,000 pieces of mail and recorded more than 18,000 comments at public hearings. The Bureau of Land Management grouped and summarized these comments. The Court finds that this was a reasonable attempt to deal with the volume of comments. Further, the Bureau of Land Management's grouping of the comments makes it clear that range scientists were the source of a number of comments.

Public Lands Council also argues that the Bureau of Land Management minimized the economic impact of the new regulations. However, the FEIS contains 29 pages discussing the economic and social impacts the new regulations would have on the livestock industry and communities that depend on the livestock industry. See FEIS at 111-140. The Bureau of Land Management therefore adequately responded to comments in this regard.

C. Environmental Effects of the 1995 Regulations

The regulations implementing NEPA require agencies to consider the cumulative impact of agency action. The regulations define a cumulative impact as:

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7 (1995).

In other words, the Bureau of Land Management must consider the cumulative impact the 1995 regulations would have when added to agency action under other acts, such as the Wild and Free Roaming Horse and Burro Act and the Endangered Species Act. The DEIS and FEIS indicate that the Bureau of Land Management did this.

In the DEIS, the Bureau of Land Management stated that the various approaches to grazing regulation would have little impact on endangered species. DEIS at 4-9. Similarly, the Bureau of Land Management analyzed the cumulative effect of the new regulations and the Wild and Free Roaming Horse

and Burro Act. The Bureau of Land Management determined that the new rules would allow for increased management of wild horses and burros and that these animals would disperse over larger areas and reduce the concentration of animals grazing in specific areas. DEIS at 36, 4-53. The Bureau of Land Management considered the cumulative impacts of the 1995 regulations; therefore, it did not violate NEPA.

Conclusion

For the reasons set forth above, the Court ORDERS that the Secretary's decision to implement the 1995 regulations is AFFIRMED IN PART and REVERSED IN PART. The Court finds that the following portions of the 1995 regulations are unlawful and violate the Taylor Grazing Act: (1) the elimination of the grazing preference and replacement with the term "permitted use"; (2) the regulations providing that the United States shall have full title to all future range improvements; (3) the regulations providing for conservation use permits; and (4) the regulations reducing the mandatory qualifications for a grazing permit.

Therefore, the Court ORDERS that these regulations are set aside and the respondents are enjoined from enforcing them. The remaining regulations do not violate the law or the Constitution and are not arbitrary or capricious.

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS

43 U.S.C. § 315. Grazing districts; establishment; restrictions; prior rights; rights-of-way; hearing and notice; hunting or fishing rights

In order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided*, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. Nothing in this subchapter shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law validly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this subchapter, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this subchapter, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. Whenever any grazing district is established pursuant to this subchapter, the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock-driving

purposes as may be necessary for the convenient access by any such owner to marketing facilities or to lands not within such district owned by such person or upon which such person has stock-grazing rights. Neither this subchapter nor the Act of December 29, 1916 (39 Stat. 862; U.S.C., title 43, secs. 291 and following), commonly known as the "Stock Raising Homestead Act", shall be construed as limiting the authority or policy of Congress or the President to include in national forests public lands of the character described in section 471 of Title 16, for the purposes set forth in section 475 of Title 16, or such other purposes as Congress may specify. Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: *Provided, however*, That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement. Nothing in this subchapter shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the Untied States or of any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district.

43 U.S.C. § 315a. Protection, administration, regulation, and improvement of districts; rules and regulations; study of erosion and flood control; offenses

The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of section 315 of this title, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this subchapter and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; and the Secretary of the Interior is authorized to continue the study of erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate the areas subject to the provisions of the subchapter, through such funds as may be made available for that purpose, and any willful violation of the provisions of this subchapter or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500.

43 U.S.C. § 315b. Grazing permits; fees; vested water rights; permits not to create right in land

The Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time in accordance with governing law. Grazing permits shall be issued only to

citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws, and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is hereby authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: *Provided further,* That nothing in this subchapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may

be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.

43 U.S.C. § 315c. Fences, wells, reservoirs, and other improvements; construction; permits; partition fences

Fences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands within such grazing districts under permit issued by the authority of the Secretary, or under such cooperative arrangement as the Secretary may approve. Permittee shall be required by the Secretary of the Interior to comply with the provisions of law of the State within which the grazing district is located with respect to the cost and maintenance of partition fences. No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior. The decision of the Secretary in such cases is to be final and conclusive.

43 U.S.C. § 315m. Lease of isolated or disconnected tracts for grazing; preferences

The Secretary of the Interior is further authorized, in his discretion, where vacant, unappropriated, and unreserved lands of the public domain are so situated as not to justify their inclusion in any grazing district to be established

pursuant to this subchapter, to lease any such lands for grazing purposes, upon such terms and conditions as the Secretary may prescribe: *Provided*, That preference shall be given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands, except, that when such isolated or disconnected tracts embrace seven hundred and sixty acres or less, the owners, homesteaders, lessees, or other lawful occupants of lands contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract, during a period of ninety days after such tract is offered for lease, upon the terms and conditions prescribed by the Secretary. *Provided further*, That when public lands are restored from a withdrawal, the Secretary may grant an appropriate preference right for a grazing lease, license, or permit to users of the land for grazing purposes under authority of the agency which had jurisdiction over the lands immediately prior to the time of their restoration.

43 U.S.C. § 315q. Withdrawal of lands for war or national defense purposes; payment for cancellation of permits or licenses

Whenever use for war or national defense purposes of the public domain or other property owned by or under the control of the United States prevents its use for grazing, persons holding grazing permits or licenses and persons whose grazing permits or licenses have been or will be canceled because of such use shall be paid out of the funds appropriated or allocated for such project such amounts as the head of the department or agency so using the lands shall determine to be fair and reasonable for the losses suffered by such persons as a result of the use of such lands for war or national defense purposes. Such payments shall be deemed payment in full for such losses. Nothing contained in this

section shall be construed to create any liability not now existing against the United States.

43 U.S.C. § 1701. Congressional declaration of policy

(a) The Congress declares that it is the policy of the United States that—

(1) the public lands be retained in Federal ownership, unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest;

(2) the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried and their present and future use is projected through a land use planning process coordinated with other Federal and State planning efforts;

(3) public lands not previously designated for any specific use and all existing classification of public lands that were effected by executive action or statute before October 21, 1976, be reviewed in accordance with the provisions of this Act;

(4) the Congress exercise its constitutional authority to withdraw or otherwise designate or dedicate Federal lands for specified purposes and that Congress delineate the extent to which the Executive may withdraw lands without legislative action;

(5) in administering public land statutes and exercising discretionary authority granted by them, the Secretary be required to establish comprehensive rules and regulations after considering the views of the general public; and to structure adjudication

procedures to assure adequate third party participation, objective administrative review of initial decisions, and expeditious decisionmaking;

(6) judicial review of public land adjudication decisions be provided by law;

(7) goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law;

(8) the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use;

(9) the United States receive fair market value of the use of the public lands and their resources unless otherwise provided for by statute;

(10) uniform procedures for any disposal of public land, acquisition of non-Federal land for public purposes, and the exchange of such lands be established by statute, requiring each disposal, acquisition, and exchange to be consistent with the prescribed mission of the department or agency involved, and reserving to the Congress review of disposals in excess of a specified acreage;

(11) regulations and plans for the protection of public land areas of critical environmental concern be promptly developed;

(12) the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 (84 Stat. 1876, 30 U.S.C. 21a) as it pertains to the public lands; and

(13) the Federal Government should, on a basis equitable to both the Federal and local taxpayer, provide for payments to compensate States and local governments for burdens created as a result of the immunity of Federal lands from State and local taxation.

(b) The policies of this Act shall become effective only as specific statutory authority for their implementation is enacted by this Act or by subsequent legislation and shall then be construed as supplemental to and not in derogation of the purposes for which public lands are administered under other provisions of law.

43 U.S.C. § 1702. Definitions

Without altering in any way the meaning of the following terms as used in any other statute, whether or not such statute is referred to in, or amended by, this Act, as used in this Act—

* * *

(p) The term "grazing permit and lease" means any document authorizing use of public lands or lands in National Forests in the eleven contiguous western States for the purpose of grazing domestic livestock.

43 U.S.C. § 1712(c) Criteria for development and revision

In the development and revision of land use plans, the Secretary shall—

(1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;

(2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;

(3) give priority to the designation and protection of areas of critical environmental concern;

(4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;

(5) consider present and potential uses of the public lands;

(6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;

(7) weigh long-term benefits to the public against short-term benefits;

(8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and

(9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and

agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under the Act of September 3, 1964 (78 Stat. 897), as amended [16 U.S.C.A. § 460*l*-4 *et seq.*], and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

43 U.S.C. § 1712(f) Procedures applicable to formulation of plans and programs for public land management

The Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.

43 U.S.C. § 1732. Management of use, occupancy, and development of public lands

(a) Multiple use and sustained yield requirements applicable; exception

The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses according to any other provisions of law it shall be managed in accordance with such law.

43 U.S.C. § 1739(e) Public participation; procedures applicable

In exercising his authorities under this Act, the Secretary, by regulation, shall establish procedures, including public hearings where appropriate, to give the Federal, State, and local governments and the public adequate notice and an opportunity to comment upon the formulation of standards and criteria for, and to participate in, the preparation and execution of plans and programs for, and the management of, the public lands.

43 U.S.C. § 1752. Grazing leases and permits

(a) Terms and conditions

Except as provided in subsection (b) of this section, permits and leases for domestic livestock grazing on public lands issued by the Secretary under the Act of June 28, 1934 (48 Stat. 1269, as amended; 43 U.S.C. 315 *et seq.*) or the Act of August 28, 1937 (50 Stat. 874, as amended; 43 U.S.C. 1181a-1181j), or by the Secretary of Agriculture, with respect to lands within National Forests in the sixteen contiguous Western States, shall be for a term of ten years subject to such terms and conditions the Secretary concerned deems appropriate and consistent with the governing law, including, but not limited to, the authority of the Secretary concerned to cancel, suspend, or modify a grazing permit or lease, in whole or in part, pursuant to the terms and conditions thereof, or to cancel or suspend a grazing permit or lease for any violation of a grazing regulation or of any term or condition of such grazing permit or lease.

(b) Terms of lesser duration

Permits or leases may be issued by the Secretary concerned for a period shorter than ten years where the Secretary concerned determines that-

(1) the land is pending disposal; or

(2) the land will be devoted to a public purpose prior to the end of ten years; or

(3) it will be in the best interest of sound land management to specify a shorter term: *Provided*, That the absence from an allotment management plan of details the Secretary concerned would like to include but which are undeveloped shall not be the basis for establishing a term shorter than ten years: *Provided further*, That the absence of

completed land use plans or court ordered environmental statements shall not be the sole basis for establishing a term shorter than ten years unless the Secretary determines on a case-by-case basis that the information to be contained in such land use plan or court ordered environmental impact statement is necessary to determine whether a shorter term should be established for any of the reasons set forth in items (1) through (3) of this subsection.

(c) First priority for renewal of expiring permit or lease

So long as (1) the lands for which the permit or lease is issued remain available for domestic livestock grazing in accordance with land use plans prepared pursuant to section 1712 of this title or section 1604 of Title 16, (2) the permittee or lessee is in compliance with the rules and regulations issued and the terms and conditions in the permit or lease specified by the Secretary concerned, and (3) the permittee or lessee accepts the terms and conditions to be included by the Secretary concerned in the new permit or lease, the holder of the expiring permit or lease shall be given first priority for receipt of the new permit or lease.

(d) Allotment management plan requirements

All permits and leases for domestic livestock grazing issued pursuant to this section may incorporate an allotment management plan developed by the Secretary concerned. However, nothing in this subsection shall be construed to supersede any requirement for completion of court ordered environmental impact statements prior to development and incorporation of allotment management plans. If the Secretary concerned elects to develop an allotment management plan for a given area, he shall do so in careful and considered consultation, cooperation and coordination with the lessees, permittees, and landowners involved, the

district grazing advisory boards established pursuant to section 1753 of this title, and any State or States having lands within the area to be covered by such allotment management plan. Allotment management plans shall be tailored to the specific range condition of the area to be covered by such plan, and shall be reviewed on a periodic basis to determine whether they have been effective in improving the range condition of the lands involved or whether such lands can be better managed under the provisions of subsection (e) of this section. The Secretary concerned may revise or terminate such plans or develop new plans from time to time after such review and careful and considered consultation, cooperation and coordination with the parties involved. As used in this subsection, the terms "court ordered environmental impact statement" and "range condition" shall be defined as in the "Public Rangelands Improvement Act of 1978".

* * *

(g) Cancellation of permit or lease; determination of reasonable compensation; notice.

Whenever a permit or lease for grazing domestic livestock is canceled in whole or in part, in order to devote the lands covered by the permit or lease to another public purpose, including disposal, the permittee or lessee shall receive from the United States a reasonable compensation for the adjusted value, to be determined by the Secretary concerned, of his interest in authorized permanent improvements placed or constructed by the permittee or lessee on lands covered by such permit or lease, but not to exceed the fair market value of the terminated portion of the permittee's or lessee's interest therein. Except in cases of emergency, no permit or lease shall be canceled under this subsection without two years' prior notification.

---

43 C.F.R. § 4100.0-5 (1995)

§ 4100.0-5 Definitions.

Whenever used in this part, unless the context otherwise requires, the following definitions apply:

The "Act" means the Taylor Grazing Act of June 28, 1934, as amended (43 U.S.C. 315, 315a-315r).

"Active use" means the current authorized use, including livestock grazing and conservation use. Active use may constitute a portion, or all, of permitted use. Active use does not include temporary nonuse or suspended use of forage within all or a portion of an allotment.

"Activity plan" means a plan for managing a resource use or value to achieve specific objectives. For example, an allotment management plan is an activity plan for managing livestock grazing use to improve or maintain rangeland conditions.

"Actual use" means where, how many, what kind or class of livestock, and how long livestock graze on an allotment, or on a portion or pasture of an allotment.

"Actual use report" means a report of the actual livestock grazing use submitted by the permittee or lessee.

* * *

"Allotment" means an area of land designated and managed for grazing of livestock.

"Allotment management plan (AMP)" means a documented program developed as an activity plan, consistent with the definition at 43 U.S.C. 1702(k), that focuses on, and contains the necessary instructions for, the management of livestock grazing on specified public lands to meet

resource condition, sustained yield, multiple use, economic and other objectives.

"Animal unit month (AUM)" means the amount of forage necessary for the sustenance of one cow or its equivalent for a period of 1 month.

"Annual rangelands" means those designated areas in which livestock forage production is primarily attributable to annual plants and varies greatly from year to year.

* * *

"Base property" means: (1) Land that has the capability to produce crops or forage that can be used to support authorized livestock for a specified period of the year, or (2) water that is suitable for consumption by livestock and is available and accessible, to the authorized livestock when the public lands are used for livestock grazing.

"Cancelled or cancellation" means a permanent termination of a grazing permit or grazing lease and grazing preference, or free-use grazing permit or other grazing authorization, in whole or in part.

"Class of livestock" means ages and/or sex groups of a kind of livestock.

"Conservation use" means an activity, excluding livestock grazing, on all or a portion of an allotment for purposes of-

(1) Protecting the land and its resources from destruction or unnecessary injury;

(2) Improving rangeland conditions; or

(3) Enhancing resource values, uses, or functions.

* * *

"Grazing district" means the specific area within which the public lands are administered under section 3 of the Act. Public lands outside grazing district boundaries are administered under section 15 of the Act.

"Grazing fee year" means the year, used for billing purposes, which begins on March 1, of a given year and ends on the last day of February of the following year.

"Grazing lease" means a document authorizing use of the public lands outside an established grazing district. Grazing leases specify all authorized use including livestock grazing, suspended use, and conservation use. Leases specify the total number of AUMs apportioned, the area authorized for grazing use, or both.

"Grazing permit" means a document authorizing use of the public lands within an established grazing district. Grazing permits specify all authorized use including livestock grazing, suspended use, and conservation use. Permits specify the total number of AUMs apportioned, the area authorized for grazing use, or both.

"Grazing preference" or "preference" means a superior or priority position against others for the purpose of receiving a grazing permit or lease. This priority is attached to base property owned or controlled by the permittee or lessee.

* * *

"Land use plan" means a resource management plan, developed under the provisions of 43 CFR part 1600, or a management framework plan. These plans are developed through public participation in accordance with the provisions of the Federal Land Policy and Management Act of 1976 (43

U.S.C. 1701 *et seq.*) and establish management direction for resource uses of public lands.

"Livestock" or "kind of livestock" means species of domestic livestock–cattle, sheep, horses, burros, and goats.

"Livestock Carrying Capacity" means the maximum stocking rate possible without inducing damage to vegetation or related resources. It may vary from year to year on the same area due to fluctuating forage production.

* * *

"Permitted use" means the forage allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease and is expressed in AUMs.

"Public lands" means any land and interest in land outside of Alaska owned by the United States and administered by the Secretary of the Interior through the Bureau of Land Management, except lands held for the benefit of Indians.

"Range improvement" means an authorized physical modification or treatment which is designed to improve production of forage; change vegetation composition; control patterns of use; provide water; stabilize soil and water conditions; restore, protect and improve the condition of rangeland ecosystems to benefit livestock, wild horses and burros, and fish and wildlife. The term includes, but is not limited to, structures, treatment projects, and use of mechanical devices or modifications achieved through mechanical means.

* * *

"Supplemental feed" means a feed which supplements the forage available from the public lands and is provided to improve livestock nutrition or rangeland management.

"Suspension" means the temporary withholding from active use, through a decision issued by the authorized officer or by agreement, of part or all of the permitted use in a grazing permit or lease.

"Temporary nonuse" means the authorized withholding, on an annual basis, of all or a portion of permitted livestock use in response to a request of the permittee or lessee.

* * *

"Utilization" means the portion of forage that has been consumed by livestock, wild horses and burros, wildlife and insects during a specified period. The term is also used to refer to the pattern of such use.

43 CFR § 4110.1 (1995)

§ 4110.1 Mandatory qualifications.

(a) Except as provided under §§ 4110.1-1, 4130.5, and 4130.6-3, to qualify for grazing use on the public lands an applicant must own or control land or water base property, and must be:

(1) A citizen of the United States or have properly filed a valid declaration of intention to become a citizen or a valid petition for naturalization; or

(2) A group or association authorized to conduct business in the State in which the grazing use is sought, all members of which are qualified under paragraph (a) of this section; or

(3) A corporation authorized to conduct business in the State in which the grazing use is sought.

(b) Applicants for the renewal or issuance of new permits and leases and any affiliates must be determined by the authorized officer to have a satisfactory record of performance.

(1) Renewal of permit or lease.

(i) The applicant for renewal of a grazing permit or lease, and any affiliate, shall be deemed to have a satisfactory record of performance if the authorized officer determines the applicant and affiliates to be in substantial compliance with the terms and conditions of the existing Federal grazing permit or lease for which renewal is sought, and with the rules and regulations applicable to the permit or lease.

(ii) The authorized officer may take into consideration circumstances beyond the control of the applicant or affiliate in determining whether the applicant and affiliates are in substantial compliance with permit or lease terms and conditions and applicable rules and regulations.

(2) New permit or lease. Applicants for new permits or leases, and any affiliates, shall be deemed not to have a record of satisfactory performance when–

(i) The applicant or affiliate has had any Federal grazing permit or lease cancelled for violation of the permit or lease within the 36 calendar months immediately preceding the date of application; or

(ii) The applicant or affiliate has had any State grazing permit or lease, for lands within the grazing allotment for which a Federal permit or lease is sought, cancelled for violation of the permit or lease within the 36 calendar months immediately preceding the date of application; or

(iii) The applicant or affiliate is barred from holding a Federal grazing permit or lease by order of a court of competent jurisdiction.

(c) In determining whether affiliation exists, the authorized officer shall consider all appropriate factors, including, but not limited to, common ownership, common management, identity of interests among family members, and contractual relationships.

(d) Applicants shall submit an application and any other relevant information requested by the authorized officer in order to determine that all qualifications have been met.

43 C.F.R. § 4110.2-2 (1995)

§ 4110.2-2 Specifying permitted use.

(a) Permitted use is granted to holders of grazing preference and shall be specified in all grazing permits and leases. Permitted use shall encompass all authorized use including livestock use, any suspended use, and conservation use, except for permits and leases for designated ephemeral rangelands where livestock use is authorized based upon forage availability, or designated annual rangelands. Permitted livestock use shall be based upon the amount of forage available for livestock grazing as established in the land use plan, activity plan, or decision of the authorized officer under § 4110.3-3, except, in the case of designated ephemeral or annual rangelands, a land use plan or activity

plan may alternatively prescribe vegetation standards to be met in the use of such rangelands.

(b) The grazing preference specified shall attach to the base property supporting the grazing permit or grazing lease.

(c) The animal unit months of permitted use are attached to:

(1) The acreage of land base property on a pro rata basis, or

(2) Water base property on the basis of livestock forage production within the service area of the water.

43 C.F.R. § 4110.3-1 (1995)

§ 4110.3-1 Increasing permitted use.

Additional forage may be apportioned to qualified applicants for livestock grazing use consistent with multiple-use management objectives.

(a) Additional forage temporarily available for livestock grazing use may be apportioned on a nonrenewable basis.

(b) Additional forage available on a sustained yield basis for livestock grazing use shall first be apportioned in satisfaction of suspended permitted use to the permittee(s) or lessee(s) authorized to graze in the allotment in which the forage is available.

(c) After consultation, cooperation, and coordination with the affected permittees or lessees, the State having lands or managing resources within the area, and the interested public, additional forage on a sustained yield basis available for livestock grazing use in an allotment may be apportioned to permittees or lessees or other applicants, provided the

permittee, lessee, or other applicant is found to be qualified under subpart 4110 of this part. Additional forage shall be apportioned in the following priority:

(1) Permittees or lessees in proportion to their contribution or stewardship efforts which result in increased forage production;

(2) Permittee(s) or lessee(s) in proportion to the amount of their permitted use; and

(3) Other qualified applicants under § 4130.1-2 of this title.

43 C.F.R. § 4110.3-2 (1995)

§ 4110.3-2 Decreasing permitted use.

(a) Permitted use may be suspended in whole or in part on a temporary basis due to drought, fire, or other natural causes, or to facilitate installation, maintenance, or modification of range improvements.

(b) When monitoring or field observations show grazing use or patterns of use are not consistent with the provisions of subpart 4180, or grazing use is otherwise causing an unacceptable level or pattern of utilization, or when use exceeds the livestock carrying capacity as determined through monitoring, ecological site inventory or other acceptable methods, the authorized officer shall reduce permitted grazing use or otherwise modify management practices.

43 C.F.R. § 4110.3-3 (1995)

§ 4110.3-3 Implementing reductions in permitted use.

(a) After consultation, cooperation, and coordination with the affected permittee or lessee, the State having lands or managing resources within the area, and the interested

public, reductions of permitted use shall be implemented through a documented agreement or by decision of the authorized officer. Decisions implementing § 4110.3-2 shall be issued as proposed decisions pursuant to § 4160.1, except as provided in paragraph (b) of this section.

(b) When the authorized officer determines that the soil, vegetation, or other resources on the public lands require immediate protection because of conditions such as drought, fire, flood, insect infestation, or when continued grazing use poses an imminent likelihood of significant resource damage, after consultation with, or a reasonable attempt to consult with, affected permittees or lessees, the interested public, and the State having lands or responsible for managing resources within the area, the authorized officer shall close allotments or portions of allotments to grazing by any kind of livestock or modify authorized grazing use notwithstanding the provisions of paragraph (a) of this section. Notices of closure and decisions requiring modification of authorized grazing use may be issued as final decisions effective upon issuance or on the date specified in the decision. Such decisions shall remain in effect pending the decision on appeal unless a stay is granted by the Office of Hearings and Appeals in accordance with 43 CFR 4.21.

43 C.F.R. § 4110.4-2 (1995)

§ 4110.4-2 Decrease in land acreage.

(a) Where there is a decrease in public land acreage available for livestock grazing within an allotment:

(1) Grazing permits or leases may be cancelled or modified as appropriate to reflect the changed area of use.

(2) Permitted use may be cancelled in whole or in part. Cancellations determined by the authorized

officer to be necessary to protect the public lands will be apportioned by the authorized officer based upon the level of available forage and the magnitude of the change in public land acreage available, or as agreed to among the authorized users and the authorized officer.

(b) When public lands are disposed of or devoted to a public purpose which precludes livestock grazing, the permittees and lessees shall be given 2 years' prior notification except in cases of emergency, (national defense requirements in time of war, natural disasters, national emergency needs, etc.) before their grazing permit or grazing lease and grazing preference may be canceled. A permittee or lessee may unconditionally waive the 2-year prior notification. Such a waiver shall not prejudice the permittee's or lessee's right to reasonable compensation for, but not to exceed the fair market value of his or her interest in authorized permanent range improvements located on these public lands (see § 4120.3-6).

43 C.F.R. § 4130.2 (1995)

§ 4130.2 Grazing permits or leases.

(a) Grazing permits or leases shall be issued to qualified applicants to authorize use on the public lands and other lands under the administration of the Bureau of Land Management that are designated as available for livestock grazing through land use plans. Permits or leases shall specify the types and levels of use authorized, including livestock grazing, suspended use, and conservation use. These grazing permits and leases shall also specify terms and conditions pursuant to §§ 4130.3, 4130.3-1, and 4130.3-2.

(b) The authorized officer shall consult, cooperate and coordinate with affected permittees or lessees, the State

having lands or responsible for managing resources within the area, and the interested public prior to the issuance or renewal of grazing permits and leases.

(c) Grazing permits or leases convey no right, title, or interest held by the United States in any lands or resources.

(d) The term of grazing permits or leases authorizing livestock grazing on the public lands and other lands under the administration of the Bureau of Land Management shall be 10 years unless–

(1) The land is being considered for disposal;

(2) The land will be devoted to a public purpose which precludes grazing prior to the end of 10 years;

(3) The term of the base property lease is less than 10 years, in which case the term of the Federal permit or lease shall coincide with the term of the base property lease; or

(4) The authorized officer determines that a permit or lease for less than 10 years is in the best interest of sound land management.

(e) Permittees or lessees holding expiring grazing permits or leases shall be given first priority for new permits or leases if:

(1) The lands for which the permit or lease is issued remain available for domestic livestock grazing;

(2) The permittee or lessee is in compliance with the rules and regulations and the terms and conditions in the permit or lease;

(3) The permittee or lessee accepts the terms and conditions to be included by the authorized officer in the new permit or lease.

(f) The authorized officer will not offer, grant or renew grazing permits or leases when the applicants, including permittees or lessees seeking renewal, refuse to accept the proposed terms and conditions of a permit or lease.

(g) Temporary nonuse and conservation use may be approved by the authorized officer if such use is determined to be in conformance with the applicable land use plans, AMP or other activity plans and the provisions of subpart 4180 of this part.

(1) Conservation use may be approved for periods of up to 10 years when, in the determination of the authorized officer, the proposed nonuse will promote rangeland resource protection or enhancement of resource values or uses, including more rapid progress toward resource condition objectives; or

(2) Temporary nonuse for reasons including but not limited to financial conditions or annual fluctuations of livestock, may be approved on an annual basis for no more than 3 consecutive years. Permittees or lessees applying for temporary nonuse shall state the reasons supporting nonuse.

(h) Application for nonrenewable grazing permits and leases under §§ 4110.3-1 and 4130.6-2 for areas for which conservation use has been authorized will not be approved. Forage made available as a result of temporary nonuse may be made available to qualified applicants under § 4130.6-2.

(i) Permits or leases may incorporate the percentage of public land livestock use (see § 4130.6-2) or may include

private land offered under exchange-of-use grazing agreements (see § 4130.4-1).

43 C.F.R. § 4130.3 (1995)

§ 4130.3 Terms and conditions.

Livestock grazing permits and leases shall contain terms and conditions determined by the authorized officer to be appropriate to achieve management and resource condition objectives for the public lands and other lands administered by the Bureau of Land Management, and to ensure conformance with the provisions of subpart 4180 of this part.

43 CFR § 4110.3-2 (1994)

§ 4110.3-2 Decreasing active use.

(a) Active use may be suspended in whole or in part on a temporary basis due to drought, fire, or other natural causes, or to facilitate installation, maintenance, or modification of range improvements.

(b) When monitoring shows active use is causing an unacceptable level or pattern of utilization or exceeds the livestock carrying capacity as determined through monitoring, the authorized officer shall reduce active use if necessary to maintain or improve rangeland productivity, unless the authorized officer determines a change in management practices would achieve the management objectives.

(c) Where active use is reduced it shall be held in suspension or in nonuse for conservation/protection purposes, until the authorized officer determines that active use may resume.